

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Nandor J. Vadas, Magistrate Judge

IVAN VERNORD CLEVELAND, et	)	
al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. C 07-02809 NJV
	)	
BEN CURRY, WARDEN, et al.,	)	
	)	
Defendants.	)	
	)	

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San Francisco, California  
Monday, November 4, 2013

**TRANSCRIPT OF PROCEEDINGS**

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## PROCEEDINGS

Monday - November 4, 2013

8:39 a.m.

P R O C E E D I N G S

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(Proceedings were heard out of presence of prospective jurors:)

**THE CLERK:** Calling Civil 07-2809, Ivan Vernord  
Cleveland versus Ben Curry.

Counsel, please state your appearances for the record.

**MR. CUNNINGHAM:** Good morning, Your Honor. Dennis  
Cunningham for the plaintiffs.

**THE COURT:** Mr. Cunningham, good morning.

**MR. QUINN:** Good morning. Michael Quinn for the  
defendants.

**THE COURT:** Mr. Quinn, good morning.

I have some late motions that were filed, I believe, on  
Friday and perhaps this morning. Why don't we take defendants'  
motions first, Objection to Plaintiffs' Exhibit Number 7,  
Cleveland's Psychological Records.

**MR. QUINN:** Right. As we stated in our papers, the  
materials were not listed on the plaintiffs' exhibit list. The  
materials -- it does not appear that there's any witness who  
could authenticate those materials so they do constitute  
hearsay.

In addition, those materials are irrelevant, we believe,  
as we described in our papers. So defendants don't have  
anything to add beyond what was stated in the papers.

## PROCEEDINGS

1           **THE COURT:** Are these documents that were provided by  
2 defendant to the plaintiff at sometime in the discovery  
3 process?

4           **MR. QUINN:** No. No. And the materials have not been  
5 provided to defendants.

6           **THE COURT:** As of this morning?

7           **MR. QUINN:** As of this time. There's basically a  
8 placeholder. Tab 7 is just one page that refers to however I  
9 described it. It's handwritten confidential documents.

10          **THE COURT:** And as of this morning, defendants have  
11 not received this document; is that correct?

12          **MR. QUINN:** That is correct.

13          **THE COURT:** Counsel?

14          **MR. CUNNINGHAM:** That's right, Judge. These are  
15 Plaintiff Cleveland's psychological records from the  
16 institution, and I include them only against the possibility  
17 that they may come into play, in which case I'd be glad to  
18 disclose them. They're not -- otherwise it would seem to me  
19 that they shouldn't be shared, but I could definitely hand them  
20 over if they want them.

21          **THE COURT:** All right. For the reasons stated,  
22 defendants' motion is granted.

23          Moving on to Plaintiffs' Added Pretrial Request. The  
24 Court received this document this morning, number two, Added  
25 Exhibit Lists.

## PROCEEDINGS

1       If I remember correctly, I have already excluded this from  
2 nonplaintiffs unless it becomes relevant and the parties  
3 request a sidebar.

4       Any comments, Counsel?

5           **MR. QUINN:** I saw that it was filed. I hadn't -- it  
6 was filed at 8:15. I didn't have a chance to really look at  
7 it, but I don't have anything beyond what you've previously  
8 ruled upon.

9           **THE COURT:** All right. Counsel?

10          **MR. CUNNINGHAM:** No, Judge. I just feel that corpus  
11 of documents -- of the documents from the institution that  
12 reflect all the activity around these cases would be --

13          **THE COURT:** Denied except as I previously ruled.

14          **MR. CUNNINGHAM:** Okay.

15          **THE COURT:** Number three, witness Lieutenant Armando  
16 Padilla.

17       Let me ask plaintiffs' counsel. Have you subpoenaed  
18 Lieutenant Padilla?

19          **MR. CUNNINGHAM:** No, I didn't, Judge. No, I haven't  
20 done it.

21          **THE COURT:** Do you intend to call Lieutenant Padilla?

22          **MR. QUINN:** He's on our witness list; but as we stated  
23 in the witness list we filed just last week, we reserve the  
24 right to change the witnesses, not call witnesses.

25          **THE COURT:** I understand.

## PROCEEDINGS

1           **MR. QUINN:** So we won't know whether we're going to  
2 call him until the trial actually begins.

3           **THE COURT:** All right. This is late. You had an  
4 opportunity, if you wanted him as your witness, to put him on  
5 your witness list and to subpoena him.

6           Plaintiffs' motion for witness Lieutenant Armando Padilla  
7 is denied unless you do intend to call him. As a courtesy, I  
8 would ask the defendants to inform plaintiff, and if it's not  
9 an imposition, to allow plaintiff to call Lieutenant Padilla  
10 first; and then you can cross-examine him if you'd like, or you  
11 can call him in your case in chief afterwards also. All right?

12           **MR. QUINN:** Okay.

13           **THE COURT:** Thank you.

14           Number four, well, you know, first of all, we asked for  
15 the instructions weeks in advance.

16           **MR. CUNNINGHAM:** I know it was a while ago, Judge. I  
17 know it was.

18           **THE COURT:** What I'm concerned about is that this is  
19 not a statement of claims and defenses but 11, 12, and 13 are  
20 indeed argument. I'll certainly allow you to inquire of the  
21 witnesses of this information and to argue it in closing.

22           But do counsel have copies of my proposed jury  
23 instructions?

24           **THE LAW CLERK:** They're here.

25           **THE COURT:** All right. Why don't you -- we have

## PROCEEDINGS

1 prepared both the initial jury instructions, a proposed closing  
2 instructions, and also proposed verdict.

3 Why don't you give it to Mr. Quinn also.

4 **MR. QUINN:** Thank you.

5 **THE COURT:** So these are, I believe, the ones that  
6 counsel have in their hand, are my proposed preliminary  
7 instructions. They are, as they should be, I believe, rather  
8 vanilla. Why don't we go through them very briefly.

9 These are the final or --

10 **THE LAW CLERK:** Preliminary.

11 **THE COURT:** Preliminary. Thank you so much.

12 Let me go through these very quickly with the parties.  
13 1.1B, Duty of Jury. Any objection?

14 **MR. CUNNINGHAM:** I'm sorry, Judge?

15 **THE COURT:** 1.1B, Duty of Jury. Any objection?

16 Well, these are -- although this looks like the final set.  
17 Hold on. These are the final instructions. This is 1.1B.

18 (Pause in proceedings.)

19 **THE COURT:** Okay. Duty of Jury, 1.1B. Any objection?

20 **MR. CUNNINGHAM:** No, Your Honor.

21 **MR. QUINN:** I don't have it.

22 **THE COURT:** All right.

23 **MR. QUINN:** It looks okay.

24 **THE COURT:** All right. 1.2, Claims and Defenses.

25 Take a look at that, please.



## PROCEEDINGS

(Pause in proceedings.)

**THE COURT:** This is -- the Court has prepared the Claims and Defenses based on the submission by both parties.

(Pause in proceedings.)

**MR. QUINN:** With regard to 1.2 --

**THE COURT:** Yes.

**MR. QUINN:** -- there's a brief line in there about the retaliation claim. We had previously raised the issue during the Pretrial Conference call that there was no defendant in this case who was being charged with retaliation; and the Court hadn't ruled one way or another, but said --

**THE COURT:** But you had indicated that one -- obviously one of the retaliation claims had been removed by motion for summary judgment; and then there remains a second retaliation claim that you believed was still operative and it's still, I believe, reflected in the Complaint.

**MR. QUINN:** It's in the Complaint, but the point is that there's no defendant. Neither Abanico nor Curry are accused of retaliating against Cleveland.

**THE COURT:** My understanding is, you can correct me if I'm wrong, but Cleveland argues that Abanico searched his cell in retaliation for his filing grievances against Abanico.

**MR. CUNNINGHAM:** No, Judge. Abanico was not the one who searched the cell.

**THE COURT:** So is there a retaliation claim remaining

## PROCEEDINGS

1 in the case?

2 **MR. CUNNINGHAM:** There is, but it's not -- it is  
3 inchoate in the sense that it doesn't accuse either defendant  
4 specifically. It was -- it was, if you recall it, ransacking  
5 of the cell that he complained of. I know there was more than  
6 one that happened.

7 And I think that that's what the sentence should reflect,  
8 not that Abanico did it, but that it happened more than once,  
9 and that it was -- that word "ransack" would have to be there  
10 because the search is obviously legitimate in and of itself or  
11 it can be.

12 **THE COURT:** Not if it's a search based on retaliation.

13 **MR. CUNNINGHAM:** No.

14 **THE COURT:** I'm going to allow it in subject to a  
15 Rule 50 motion at the end of the submission of the evidence,  
16 Counsel.

17 **MR. QUINN:** If I can just add in closing, there is, I  
18 think, a potential for confusing the jury if the plaintiff is  
19 allowed to assert these claims where there's no defendant  
20 really to answer them. I just --

21 **THE COURT:** I understand, but at this juncture I think  
22 I'm going to allow him subject to a Rule 50 motion at the  
23 closing of the evidence.

24 I'm going to change Claims and Defenses. In addition,  
25 Plaintiff Cleveland argues his search -- his cell was searched

## PROCEEDINGS

1 in retaliation for Cleveland filing grievances against Abanico.

2 **MR. CUNNINGHAM:** Can we have an adjective to modify  
3 "search"?

4 **THE COURT:** No. That will be denied.

5 **THE LAW CLERK:** And then the next-to-the-last  
6 sentence.

7 **MR. CUNNINGHAM:** Judge, also --

8 **THE COURT:** Defendants also argue that Cleveland's  
9 cell was not searched in retaliation for filing complaints  
10 against him.

11 All right.

12 **MR. CUNNINGHAM:** Judge, I think also in the first  
13 paragraph it ought to state -- it ought to -- where it says,  
14 "Prison officials failed to take meaningful action," I think it  
15 should say, "Prison officials under the command of the  
16 defendant Warden Curry, former Warden Curry," so that he is  
17 explicitly named in the plaintiffs' claims.

18 **THE COURT:** Counsel?

19 **MR. QUINN:** I don't think there's any need to amplify  
20 what's already there. I mean, the sentence is clear and I  
21 think it's just overkill, for lack of a better term.

22 **THE COURT:** So after "officials" what is it that you  
23 want, Counsel?

24 **MR. CUNNINGHAM:** "Under the command" -- "under the  
25 command of Defendant Curry."

## PROCEEDINGS

1           **THE COURT:** "Under the..."

2           So you're asserting a supervisory liability claim?

3           **MR. CUNNINGHAM:** Yes.

4           **MR. QUINN:** He's asserting a claim failure to  
5           intervene. There's no supervisory liability claim that's  
6           listed in the -- by name in the Amended Complaint that's the  
7           operative Complaint.

8           **THE COURT:** You know, at 15 minutes to 9:00 before --  
9           10 minutes to 9:00 before we pick a jury, this is really the  
10          wrong time to be arguing this.

11          **MR. CUNNINGHAM:** Well, it's a case -- the claim has  
12          been there, Judge, a *Farmer versus Brennan* claim, all the way  
13          along; and, you know, there's -- there may be an issue of  
14          syntax or semantics, but that's --

15          **THE COURT:** All right. "Prison officials under  
16          the" --

17          **MR. CUNNINGHAM:** Command, supervision, whatever.

18          **THE COURT:** -- "under the supervision of Defendant  
19          Curry."

20          And, again, that's subject to a Rule 50 at the close of  
21          evidence.

22          **MR. QUINN:** I'll just note for the record, plaintiffs'  
23          counsel has not subpoenaed Warden Curry either.

24          **THE COURT:** All right. We'll proceed. It might be an  
25          interesting Rule 50.

## PROCEEDINGS

1.3, Burden of Proof/Preponderance of the Evidence?

**MR. CUNNINGHAM:** Fine with us.

**THE COURT:** There is no clear-and-convincing standard in this case do you believe?

**MR. QUINN:** I don't believe so.

**THE COURT:** Counsel?

**MR. CUNNINGHAM:** I don't believe there is, Judge.

**THE COURT:** The *Harvey* search indicates that the claims that have been put forth in the Amended Complaint are only those that need a burden of proof of preponderance of the evidence. That may change for some reason and we can revisit that with the final instructions if necessary.

Two or More Parties, Different Legal Rights?

**MR. QUINN:** That's fine.

**MR. CUNNINGHAM:** That's fine, Judge.

**THE COURT:** 1.6, What is Evidence. Any objection?

**MR. CUNNINGHAM:** Yes, that's fine.

**MR. QUINN:** That's fine.

**THE COURT:** 1.7, What is not Evidence?

(Pause in proceedings.)

**MR. CUNNINGHAM:** It's all right.

**MR. QUINN:** It's fine.

**THE COURT:** 1.8, Evidence for Limited Purpose?

**MR. CUNNINGHAM:** That's fine.

**MR. QUINN:** That's fine.

## PROCEEDINGS

1           **THE COURT:** 1.9, Direct and Circumstantial Evidence?

2                               (Pause in proceedings.)

3           **MR. QUINN:** It's fine.

4           **MR. CUNNINGHAM:** It's fine, Judge.

5           **THE COURT:** 1.10, Ruling on Objections?

6           **MR. CUNNINGHAM:** Fine with plaintiff.

7           **MR. QUINN:** It's fine.

8           **THE COURT:** 1.11, Credibility of Witnesses?

9           **MR. CUNNINGHAM:** Fine.

10          **MR. QUINN:** It's fine.

11          **THE COURT:** And then 1.12, Conduct of the Jury. I've  
12 included in that the admonitions not to use electronic devices.

13          **MR. CUNNINGHAM:** You mean in terms of, like, looking  
14 up something on Wikipedia or something like that?

15          **THE COURT:** In the chat rooms, blogs, Web site, or  
16 other feature, email, text messaging, et cetera, et cetera.

17          **MR. CUNNINGHAM:** Oh, I see.

18          **MR. QUINN:** It's fine.

19          **MR. CUNNINGHAM:** Okay, Judge, yes.

20          **THE COURT:** 1.13, No Transcript Available for the  
21 Jury?

22          **MR. CUNNINGHAM:** Fine.

23          **MR. QUINN:** That's fine.

24          **THE COURT:** 1.14, Taking Notes. I will allow them to  
25 take notes.

## PROCEEDINGS

1           **MR. QUINN:** That's fine.

2           **MR. CUNNINGHAM:** Do they keep the notebooks here in  
3 the courtroom?

4           **THE COURT:** Yes. They can't take them out.

5           And, Lisa, how would you like to do that? Would you like  
6 to collect them every day?

7           **THE CLERK:** No. They can just leave them on their  
8 seats.

9           **THE COURT:** Leave them on their seats.

10          **THE CLERK:** Or they can take them back into the jury  
11 room, as long as they don't --

12          **THE COURT:** I'll let you deal with it.

13          **THE CLERK:** Okay.

14          **THE COURT:** Thank you.

15          1.18, Bench Conferences and Recesses?

16          **MR. QUINN:** That's fine.

17          **MR. CUNNINGHAM:** Yes.

18          **THE COURT:** Then 1.19, Outline of the Trial?

19          **MR. CUNNINGHAM:** Looks good, Judge.

20          **MR. QUINN:** It's fine.

21          **THE COURT:** All right. The Court will then give the  
22 preliminary instructions as modified.

23          Lisa, please let me know when the jury is ready.

24          **THE CLERK:** Okay.

25          **THE COURT:** Thank you.

## PROCEEDINGS

1           **THE CLERK:** You're welcome.

2                           (Recess taken at 8:56 a.m.)

3                           (Proceedings resumed at 9:05 a.m.)

4       (Proceedings were heard out of presence of prospective jurors:)

5           **THE CLERK:** Calling Civil 07-2809, Ivan Vernord  
6 Cleveland versus Ben Curry.

7           **THE COURT:** I forgot to ask counsel, any objection to  
8 having preliminary matters heard outside of your clients being  
9 here?

10          **MR. CUNNINGHAM:** No. You mean -- I'm not sure what  
11 you mean, Judge.

12          **THE COURT:** The preliminary matters we just took up.

13          **MR. CUNNINGHAM:** Oh, no, no. No. I mean,  
14 retrospectively, no. That's all right.

15          **THE COURT:** All right. Thank you.

16          **MR. CUNNINGHAM:** But, Judge, I do want to ask that you  
17 request the guards to let the prisoners have at least one hand  
18 free so they can write notes and stuff like that. They're  
19 gaffled to the waist at this point.

20          **THE COURT:** All right. I believe I said on Friday  
21 that the inmates would be allowed to be just in leg chains and  
22 to have their hands free at this time. So if we could, I would  
23 appreciate that.

24               But first, gentlemen, good morning.

25          **ALL:** Good morning.



## PROCEEDINGS

1           **THE COURT:** I'm Judge Vadas. I'm going to allow you  
2 to be present during the trial and allow you to sit at counsel  
3 table with your lawyers, and I'm going to allow you to have  
4 your hands free at this juncture to take notes and to assist  
5 your counsel in the trial.

6           The very first indication that I have that there's any  
7 problems here, I will have you removed from the courtroom and  
8 you can watch the trial by videoconference.

9           So what I would like from each one of you is a promise and  
10 an understanding that you realize that this is a benefit that  
11 I'm giving you to be here during the trial, and that you will  
12 respect that and not cause any trouble.

13          Do I have that from all of you?

14           **ALL:** Yes, sir.

15           **THE COURT:** All right. Having said that, you can go  
16 ahead and let them have their frees.

17           **THE CORRECTIONAL OFFICER:** Both hands, sir?

18           **THE COURT:** Yes, that will be all right. Both hands  
19 at this juncture.

20          All right. Thank you.

21                   (Recess taken at 9:07 a.m.)

22                   (Proceedings resumed at 9:28 a.m.)

23          (Jury voir dire was reported but not transcribed as a part  
24 of the Hourly Delivery of the transcript.)

25          (Proceedings were heard in presence of the prospective jurors:)

## PROCEEDINGS

1           **THE COURT:** Madam Clerk, if you would call the jurors.

2           **THE CLERK:** Okay. At this time I'm going to call the  
3 jurors that were selected.

4           Juror Number 1 is Nancy Mowbray. If you'll please come  
5 forward and take Seat Number 1 at the top.

6                           (Cell phone ringing.)

7           **THE CLERK:** And, Counsel, make sure their cell phones  
8 are off.

9           **THE COURT:** Next time that happens, the Court owns the  
10 cell phone. Have I made myself clear, Counsel?

11          **MR. WOZNIAK:** Yes, Judge.

12          **THE CLERK:** Michael Gray, Juror Number 2.

13          Omayya Rand, you're Juror Number 3.

14          Julie Jaffarian, you're Juror Number 4.

15          Karen Vickers, you're Juror Number 5. If you'll please  
16 take the first seat in the bottom row.

17          Michael Deloach, you're Juror Number six.

18          Lisa Berrett, Juror Number 7.

19          Janet O'Leary, you're Juror Number 8.

20          Your Honor, the jury has been seated.

21          **THE COURT:** All right. Mr. Quinn, is this your jury?

22          **MR. QUINN:** Yes, Your Honor.

23          **THE COURT:** Mr. Cunningham, is this your jury?

24          **MR. CUNNINGHAM:** Yes, Your Honor.

25          **THE COURT:** Ladies and gentlemen, those of you who

**PRELIMINARY JURY INSTRUCTIONS**

1 have not been picked this morning, the Court and the parties  
2 would like to thank you for taking the time out of your busy  
3 schedule to attend this portion of the jury selection. So when  
4 you get called again, now at least you get to say, "I got this  
5 far."

6 (Laughter)

7 **THE COURT:** Please go back to the Jury Commissioner  
8 and you'll get further instructions. Thank you again for your  
9 service.

10 (Prospective jurors excused.)

11 **THE COURT:** Ms. Clark, would you administer the oath,  
12 please?

13 **THE CLERK:** Okay. Will the jury please stand and  
14 raise your right hand?

15 (Jurors sworn.)

16 **THE CLERK:** Please be seated.

17 **PRELIMINARY JURY INSTRUCTIONS**

18 **THE COURT:** Ladies and gentlemen of the jury, you are  
19 now the jury in this case. It is my duty to instruct you on  
20 the law.

21 You must not infer from these instructions, or from  
22 anything I may say or do, as indicating that I have an opinion  
23 regarding the evidence or what your verdict should be.

24 It is your duty to find the facts from all the evidence in  
25 the case. To those facts, you will apply the law as I give it

**PRELIMINARY JURY INSTRUCTIONS**

1 to you. You must follow the law as I give it to you whether  
2 you agree with it or not; and you must not be influenced by any  
3 personal likes or dislikes, opinions, prejudices, or sympathy.  
4 That means that you must decide the case solely on the evidence  
5 before you. You will recall that you took an oath to do so.

6 In following my instructions, you must follow all of them  
7 and not single out some and ignore the others. They are all  
8 important.

9 I will now give you a brief summary of the positions of  
10 the parties.

11 Plaintiffs allege that beginning in May 2006 they were  
12 intentionally and pointedly groped, fondled, and molested by  
13 Defendant Abanico under cover of an authorized clothed body  
14 search in violation of the Eighth Amendment.

15 Plaintiffs argue that the searches were not conducted in  
16 accordance with the rules or with the training Abanico  
17 received. They claim that although they complained about the  
18 searches and filed formal grievances against Abanico, prison  
19 officials, under the supervision of Defendant Curry, failed to  
20 take meaningful action to prevent Abanico from interacting with  
21 prisoners.

22 In addition, Plaintiff Cleveland argues that his cell was  
23 searched in retaliation for Cleveland filing grievances against  
24 Abanico.

25 Defendants deny plaintiffs' claims in their entirety.

**PRELIMINARY JURY INSTRUCTIONS**

1 Defendants argue that they did not violate plaintiffs' rights.  
2 To the contrary, they argue that Abanico adhered to the  
3 training he received at the Correctional Academy while  
4 performing such searches.

5 Defendants further argue that such searches performed in  
6 accordance with the Department's training manual requires some  
7 amount of touching or grabbing of plaintiffs' groin and  
8 buttocks through their clothes to accomplish the purpose of the  
9 search.

10 Defendants also argue that because Abanico's contact with  
11 plaintiffs' groins during the searches did not last longer than  
12 a few seconds, they were consistent with search procedures, and  
13 because there was no evidence that plaintiffs were sexually  
14 abused or molested during the searches, there was no reason for  
15 Curry to intervene in the matter.

16 Accordingly, defendants argue that they did not violate  
17 plaintiffs' Eighth Amendment rights.

18 Defendants also argue that Cleveland's cell was not  
19 searched in retaliation for filing complaints against him.

20 Finally, defendants argue that they're entitled to  
21 qualified immunity.

22 Burden of proof/preponderance of the evidence. When a  
23 party has a burden of proof by any claim by a preponderance of  
24 the evidence, it means that you must be persuaded by the  
25 evidence that the claim is more probably true than not true.

**PRELIMINARY JURY INSTRUCTIONS**

1        You should base your decision on all of the evidence  
2        regardless of which party presented it.

3        Burden of proof/clear and convincing evidence. When a  
4        party has the burden of proving any claim by clear and  
5        convincing evidence, it means you must be persuaded by the  
6        evidence that the claim or defense is highly probable. This is  
7        a standard of proof -- this is a higher standard of proof than  
8        proof by a preponderance of the evidence.

9        You should base your decision on all of the evidence  
10       regardless of which party presented it.

11       You should decide the case as to each party separately.  
12       Unless otherwise stated, the instructions apply to all parties.

13       The evidence you are to consider in deciding what facts  
14       are consists of the sworn testimony of any witness, the  
15       exhibits which are received into evidence, and any facts to  
16       which the lawyers have agreed.

17       In reaching your verdict, you may consider only the  
18       testimony and exhibits received into evidence. Certain things  
19       are not evidence and you may not consider them in deciding what  
20       the facts are. I will list them for you.

21       One, arguments and statements by lawyers are not evidence.  
22       The lawyers are not witnesses. What they have said in their  
23       opening statements, closing arguments, and at other times is  
24       intended to help you interpret the evidence, but it is not  
25       evidence. If the facts as you remember them differ from the

**PRELIMINARY JURY INSTRUCTIONS**

1 way the lawyers have stated them, your memory of them controls.

2 Questions and objections by lawyers are not evidence.

3 Attorneys have a duty to their clients to object when they  
4 believe a question is improper under the rules of evidence.

5 You should not be influenced by the objection or by the Court's  
6 ruling on it.

7 Testimony that has been excluded or stricken or that you  
8 have been instructed to disregard is not evidence and must not  
9 be considered. In addition, sometimes testimony and exhibits  
10 are received only for a limited purpose. When I give a  
11 limiting instruction, you must follow it.

12 Anything you may have seen or heard when the Court was not  
13 in session is not evidence. You are to decide the case solely  
14 on the evidence received at trial.

15 Some evidence may be for a limited purpose only. When I  
16 instruct you that an item of evidence has been admitted for a  
17 limited purpose, you must consider it only for that limited  
18 purpose and for no other.

19 Evidence may be direct or circumstantial. Direct evidence  
20 is direct proof of a fact, such as testimony by a witness about  
21 what that witness personally saw or heard or did.

22 Circumstantial evidence is proof of one or more facts from  
23 which you could find another fact. You should consider both  
24 kinds of evidence. The law makes no distinction between the  
25 weight to be given to either direct or circumstantial evidence.

**PRELIMINARY JURY INSTRUCTIONS**

1 It is for you to decide how much weight to give to any  
2 evidence.

3 By way of example, if you wake up in the morning and see  
4 that the sidewalk is wet, you may find from that fact that it  
5 rained during the night; however, other evidence, such as a  
6 turned-on garden hose, may provide a different explanation for  
7 the presence of water on the sidewalk.

8 Therefore, before you decide that a fact has been  
9 proven -- has been proved by circumstantial evidence, you must  
10 consider all the evidence in the light of reason, experience,  
11 and common sense.

12 There are rules of evidence that control what can be  
13 received into evidence. When a lawyer asks a question or  
14 offers an exhibit into evidence and a lawyer on the other side  
15 thinks that it is not permitted by the rules of evidence, that  
16 lawyer may object. If I overrule the objection, the question  
17 may be answered or the exhibit received.

18 If I sustain the objection, the question cannot be  
19 answered and the exhibit cannot be received. Whenever I  
20 sustain an objection to a question, you must ignore the  
21 question and must not guess what the answer might have been.

22 Sometimes I may order that evidence be stricken from the  
23 record and that you disregard or ignore the evidence. That  
24 means that when you are deciding the case, you must not  
25 consider the evidence that I told you to disregard.



**PRELIMINARY JURY INSTRUCTIONS**

1        In deciding the facts of this case, you may have to decide  
2        which testimony to believe and which testimony not to believe.  
3        You may believe everything a witness says or part of it or none  
4        of it.

5        Proof of a fact does not necessarily depend on the number  
6        of witnesses who testify about it.

7        In considering the testimony of any witness, you may take  
8        into account the opportunity and ability of the witness to see  
9        or hear or know the things testified to, the witness' memory,  
10       the witness' manner while testifying, the witness' interest in  
11       the outcome of the case and any bias or prejudice, whether  
12       other evidence contradicted the witness' testimony, the  
13       reasonableness of the witness' testimony in light of all the  
14       evidence, and any other factor that bears on credibility or  
15       believability.

16       The weight of the evidence as to a fact does not  
17       necessarily depend on the number of witnesses who testify about  
18       it.

19       I will now say a few words about your conduct as jurors.  
20       First, keep an open mind throughout the trial and do not decide  
21       what the verdict should be until you and your fellow jurors  
22       have completed your deliberations at the end of the case.

23       Second, because you must decide this case based only on  
24       the evidence in the case and on my instructions as to the law  
25       that applies, you must not be exposed to any other information

**PRELIMINARY JURY INSTRUCTIONS**

1 about the case or the issues involved during the course of your  
2 jury duty. Thus, until the end of the case or unless I tell  
3 you otherwise, do not communicate with anyone in any way and do  
4 not let anyone else communicate with you in any way about the  
5 merits of the case or anything to do with it.

6 This includes discussing the case in person, in writing,  
7 by phone, or electronic means, via email, text messaging, or  
8 any Internet chat room, blog, or Web site, or other feature.

9 This applies to communicating with your fellow jurors  
10 until I give you the case for deliberation; and it applies to  
11 communicating with everyone else, including your family  
12 members, your employer, media, or press, and the people  
13 involved in the trial, although you may notify your family and  
14 your employer that you have been seated as a juror in the case;  
15 but if you are asked or approached in any way about your jury  
16 service or anything about this case, you must respond that you  
17 have been ordered not to discuss the matter and to report the  
18 contact to the Court.

19 Because you will receive all the evidence and legal  
20 instruction you properly may consider to return a verdict, do  
21 not read, watch, or listen to any news or media accounts or  
22 commentary about the case, or anything to do with it.

23 Do not do any research, such as consulting dictionaries,  
24 searching the Internet, or using other reference materials, and  
25 do not make any investigation or in any other way try to learn

**PRELIMINARY JURY INSTRUCTIONS**

1 about the case on your own.

2 The law requires these restrictions to ensure the parties  
3 have a fair trial based on the same evidence that each party  
4 has had an opportunity to address. A juror who violates these  
5 restrictions jeopardizes the fairness of these proceedings and  
6 a mistrial could result and require the entire trial process to  
7 start over. If any juror is exposed to any outside  
8 information, please notify the Court immediately.

9 During deliberations, you will have to make your decision  
10 based on what you recall of the evidence. You will not have a  
11 transcript of the trial. I urge you to pay close attention to  
12 the testimony as it is given.

13 If at any time you cannot hear or see the testimony,  
14 evidence, questions, or arguments, let me know so that I can  
15 correct the problem.

16 If you wish, you may take notes to help you remember the  
17 evidence. If you do not take notes -- excuse me. If you do  
18 take notes, please keep them to yourself until you and your  
19 fellow jurors go to the jury room to decide the case. Do not  
20 let note taking distract you.

21 When you leave, your notes should be left in the envelope  
22 in the jury room. No one will read your notes. They will be  
23 destroyed at the conclusion of the case.

24 Whether or not you take notes, you should rely on your own  
25 memory of the evidence. Notes are only to assist your memory.

**PRELIMINARY JURY INSTRUCTIONS**

1 You should not be overly influenced by your notes or those of  
2 your fellow jurors.

3 Ms. Clark later on will explain to you the protocol for  
4 keeping your note tablets during the trial.

5 From time to time during the trial it may become necessary  
6 for me to talk with the attorneys out of the hearing of the  
7 jury, either by having a conference at the bench when the jury  
8 is present in the courtroom or by calling a recess. Please  
9 understand that while you're waiting, we are working. The  
10 purpose of these conferences is not to keep relevant  
11 information from you, but to decide how certain evidence is to  
12 be treated under the rules of evidence and how to avoid  
13 confusion and error.

14 Of course, we will do what we can to keep the number and  
15 length of these conferences to a minimum. I may not always  
16 grant an attorney's request for a conference. Do not consider  
17 my granting or denying a request for a conference as any  
18 indication of my opinion of the case or of what your verdict  
19 should be.

20 The trial proceeds in the following way:

21 First, each side may make an opening statement. Any  
22 opening statement is not evidence. It is simply an outline to  
23 help you understand what the party expects the evidence will  
24 show. A party is not required to make an opening statement.

25 Plaintiff will then present evidence, and counsel for

## PRELIMINARY JURY INSTRUCTIONS

1 defendants may cross-examine. Then the defendants may present  
2 evidence and counsel for plaintiff may cross-examine.

3 After the evidence has been presented, I will instruct you  
4 on the law that applies to the case and the attorneys will make  
5 closing arguments. After that, you will go to the jury room to  
6 deliberate on your verdict.

7 It is now five minutes to noon. It's now your case. My  
8 suggestion is the following:

9 We take evidence from 9:00 to noon with a 15-minute break,  
10 and then from 1:00 to 4:00 with a 15-minute break. If you'd  
11 like a longer lunch hour, then I push the closing of the court  
12 day further back.

13 So would you like to come back at 1:00 o'clock or at 1:30?

14 **A JUROR:** I vote for 1:00.

15 **A JUROR:** 1:00.

16 **THE COURT:** It looks like everyone votes for 1:00.

17 So I'll excuse you at this time. Please be promptly back  
18 at your seats at 1:00 p.m. for opening statements.

19 Have just a brief seat inside the jury room and Ms. Clark  
20 will give you your badges so people will know to avoid you like  
21 the plague.

22 All right. Thank you.

23 Anything further, Counsel, at this time?

24 **MR. CUNNINGHAM:** No, Your Honor.

25 **MR. QUINN:** No, Your Honor.

## PROCEEDINGS

1           **THE COURT:** All right. Opening statements at 1:00 and  
2 your first witness afterwards.

3           **MR. CUNNINGHAM:** Say that last again?

4           **THE COURT:** And your first witness afterwards.

5           **MR. CUNNINGHAM:** Yes.

6                   (Luncheon recess taken at 11:56 a.m.)

7           **Afternoon Session**

**1:03 p.m.**

8                   (Proceedings were heard out of presence of the jury:)

9           **THE COURT:** Counsel wanted to see me before . . .

10           **MR. CUNNINGHAM:** Yes, Judge. For the plaintiffs, we,  
11 first of all, have a concern about being able to visit with the  
12 clients in the off times. They're -- They're in a holding cell  
13 here where apparently it's impossible to visit it during the  
14 lunch hour, and I don't know -- Apparently the courtroom is the  
15 only good place. Because they --

16           **THE COURT:** Well, hold up.

17                   What about taking them up to the lockup on the 20th floor?  
18 Can you arrange that?

19                   They should have opportunity to talk to them during the  
20 course of the trial, so if you could work something out, I'd  
21 appreciate it.

22           **THE CORRECTIONAL OFFICER:** Okay.

23           **THE COURT:** If it's a problem, let me know and then  
24 we'll talk some more; okay?

25           **THE CORRECTIONAL OFFICER:** What time?

## PROCEEDINGS

1           **THE COURT:** Probably lunchtime is the best time. And  
2 they have to be fed, too.

3           **THE CORRECTIONAL OFFICER:** Yes.

4           **THE COURT:** You get them here what time?

5           **THE CORRECTIONAL OFFICER:** Between 8:30 -- Right  
6 around 8:30.

7           **THE COURT:** Right around --

8           **THE CORRECTIONAL OFFICER:** The marshals don't start  
9 till about 8 o'clock. They need time to up and get situated,  
10 so we try to get them to them at 8:30.

11           **THE COURT:** All right. Let's see if we can't give  
12 them some time before trial tomorrow morning. Then if that  
13 doesn't work, then we're talking about having extra time at  
14 lunch; okay?

15           **MR. CUNNINGHAM:** That would be good, Judge. I mean,  
16 we do need a little time.

17           **THE COURT:** Okay.

18           **MR. CUNNINGHAM:** And maybe the end of the day a little  
19 while before they rush off. I know they want to get back.

20           **THE CORRECTIONAL OFFICER:** It's not a matter of us  
21 wanting to get back.

22           **THE COURT:** No, I know, but you've got shift change  
23 and all of that.

24           Maybe after today, if they could wait -- If maybe after  
25 the close of taking the evidence this afternoon, maybe they

## PROCEEDINGS

1 could have a half an hour before you transport them? I hope  
2 that --

3 **THE CORRECTIONAL OFFICER:** Will that be here?

4 **THE COURT:** Yes. How does that work?

5 **MR. CUNNINGHAM:** That would be good, Judge. This  
6 Sergeant, he's been very helpful. He's running the show.

7 **THE COURT:** All right.

8 **MR. CUNNINGHAM:** My other concern at this moment is  
9 that the hint that Mr. Quinn made this morning about Warden  
10 Curry's not here. He's told them he's not going to come but we  
11 fully intend to call him in our case. I don't know if we can  
12 meet our burden without it. We didn't subpoena him, but I just  
13 assumed he'd be here. I'm kind of taken aback that he's not  
14 here.

15 **THE COURT:** Mr. Quinn.

16 **MR. QUINN:** Well, I mean, the plaintiff wanted to use  
17 him as a witness. There's Rules of Federal Procedure. He  
18 could have subpoenaed him.

19 He's listed on our witness list, but as with Lieutenant  
20 Padilla, we may call him but, as the case proceeds, we may  
21 decide not to, so --

22 **THE COURT:** Okay. Well --

23 **MR. CUNNINGHAM:** But we put him on the original  
24 witness list back --

25 **THE COURT:** No, I know, but counsel's right. You did



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1 have a burden to -- to -- to --

2 **MR. CUNNINGHAM:** Notify.

3 **THE COURT:** -- subpoena him yourself.

4 However, it may have been that -- that he was -- that  
5 there was a misunderstanding that you intended to call him and  
6 then changed your mind subsequent to that. I mean, I'm a  
7 little concerned about -- about that.

8 **MR. QUINN:** Well, the defendants hadn't had any  
9 conversations with plaintiffs or anybody about calling Curry or  
10 not calling Curry.

11 **THE COURT:** All right. So there was no discussion  
12 about that.

13 **MR. QUINN:** Absolutely none.

14 **MR. CUNNINGHAM:** Other than putting him on our list,  
15 so . . .

16 **THE COURT:** Well, I understand that, but that's not  
17 enough.

18 (Pause in proceedings.)

19 **THE COURT:** Well, why don't we proceed this  
20 afternoon -- this afternoon, and I'll think about it, and we'll  
21 see where we go at the end of the day; all right?

22 **MR. QUINN:** Thank you.

23 **THE COURT:** Madam Reporter?

24 (Court and court reporter confer.)

25 (Pause in proceedings.)

## OPENING STATEMENT / CUNNINGHAM

1           **THE COURT:** Okay.

2           **MR. QUINN:** With respect to depositions, we have five  
3 sealed depositions that we may be referring to.

4           We were wondering, we have some electronics or technology  
5 here where we -- we were wondering if we could use the sealed  
6 depositions after they're opened and put them up on the ELMO.

7           **THE COURT:** Have they -- They've obviously been  
8 exchanged with counsel; is that correct?

9           **MR. QUINN:** Well, counsel was at the deposition.

10          **THE COURT:** At the depositions. All right.

11          Yeah, I see no reason why not.

12          All right. Why don't we proceed. Miss Clark, if you  
13 could call the jury in.

14                               (Pause in proceedings.)

15          (Proceedings were heard in the presence of the jury:)

16          **THE CLERK:** Okay. We're back on the record in civil  
17 07-2809, Ivan Cleveland versus Ben Curry.

18          **THE COURT:** Mr. Cunningham, your opening statement.

19          **MR. CUNNINGHAM:** Thank you, Your Honor.

20                               **OPENING STATEMENT**

21          **MR. CUNNINGHAM:** This is a job for me now to try to  
22 orient you with -- as to the evidence that is going to be  
23 brought in, what the evidence will show, and what you will be  
24 called upon to interpret, understand and interpret.

25          And it's all about stuff that happens in what a lot of

## OPENING STATEMENT / CUNNINGHAM

1 people call another world. It's been called a world apart but  
2 it's actually in this world, it's part of this world. It's a  
3 prison, a big part of this world, a big part, and yet there is  
4 a huge difference in what life is like in the prison.

5 So you're going to learn that these guys, all of whom have  
6 done a lot of time already, and four of them who have life  
7 sentences although they're all working on getting parole, and  
8 Ivan Cleveland had a sentence with an 85 percent rule. That  
9 means that you can only get 15 percent off for good time.

10 So they've been living in prison for a long time. And in  
11 prison, one of the things that happens to you constantly is,  
12 you get searched. You get patted -- You get what they call a  
13 clothed-body search.

14 There are other kind of searches, like strip search when  
15 you take off your clothes and your body's inspected when you're  
16 naked, and they have even further ability in a given case when  
17 they have a reasonable suspicion.

18 You don't need any suspicion to search, unlike if you were  
19 on the street, to search prisoners at random in the prison  
20 moving from place to place. They can be searched really at the  
21 drop of the hat.

22 And in the prison at Soledad, which is where they all were  
23 when this took place, which is down near Salinas, there's a  
24 huge central corridor that's very long and all of the cell  
25 blocks are -- you enter the cell blocks off of the corridor.

## OPENING STATEMENT / CUNNINGHAM

1 You enter other places, the -- the mess hall, the kitchen,  
2 counselor's offices, different job sites. You go to the yard  
3 from the cell block. Visits. Just about anyplace you're going  
4 to go from a cell block, or what they call a wing down there.  
5 You're going to go out of the wing into the corridor and go  
6 where you're going someplace in the corridor.

7 Now, they have guards stationed in the corridor, mostly  
8 pretty much a couple at each place where you can come into the  
9 corridor and go out of the corridor, but not necessarily any  
10 fixed place.

11 And a certain number of those guys, pretty much all of  
12 them, are -- are -- are -- among their other duties, when  
13 they're on duty in the corridor, is to perform random  
14 clothed-body searches.

15 And complaints of the plaintiffs in this case are about  
16 random clothed-body searches as they were carried out by  
17 Officer Abanico. Officer Abanico at the time -- and, again,  
18 these -- these events are all six or seven years old. For  
19 reasons which need'nt concern you, it's taken us this long to  
20 get to this point where they have claims against them.

21 But during 2006 and 2007 -- 2006 he was fairly new. And  
22 when he came to work in the corridor, there started to be  
23 complaints about the way he searched. And ultimately there  
24 were quite a big number of complaints about the way he searched  
25 and specifically that frequently he went over the line

## OPENING STATEMENT / CUNNINGHAM

1 sexually. He would grab the genitals. He would squeeze them.  
2 He would grab the penis. He would squeeze it.

3 When they search you, you get -- you're told to assume the  
4 position, so to speak. You get on the wall with your hands up  
5 on the wall like this (indicating), and they spread your legs,  
6 and they want you leaning.

7 So the point is, you're in a secure position. You  
8 can't -- It's difficult for you to make any kind of move  
9 without first, you know, retaining your balance and doing  
10 whatever.

11 And the officer's behind you. And the second officer is  
12 usually there with his back to the search that's taking place,  
13 and he's watching the rest of the traffic in the corridor.  
14 He's making sure they keep moving and don't stop to watch  
15 what's going on in the search. He's making sure nobody comes  
16 out of the corridor, traffic, and up to the place where the  
17 search is going on. He just -- So he's -- he's a little  
18 security for the search that's happening by the other officer.

19 And in the searches that we're complaining about, Officer  
20 Abanico would be doing a search from behind and he would have  
21 another officer there, but that officer wouldn't be watching.  
22 He wouldn't see what happened and wouldn't necessarily know  
23 what happened.

24 And the prisoner wouldn't necessarily know who it was.  
25 Even though it might be someone he was perfectly familiar with,

## OPENING STATEMENT / CUNNINGHAM

1 by the time he gets pulled out of the traffic and put on the  
2 wall, he's paying attention to the officer who's ordering him  
3 to do that, and that would be in these cases Officer Abanico.

4 The . . . When you're in prison, and when you're in  
5 prison as long as these guys have been in prison, you've been  
6 searched thousands of times.

7 If you've been in prison 10 years, you've undoubtedly been  
8 searched at least once a day. So that's 3,000 searches, 3600  
9 searches right there. So if you've been down 20 years, you've  
10 got 7, 8, 10,000 searches.

11 Every one of these men will tell you nobody ever searched  
12 them the way Officer Abanico did that caused them to file  
13 complaints against him. They had never had their genitals  
14 grabbed and squeezed, nothing like that, except in these cases.

15 And that, I think, is going to be a very important element  
16 of the evidence here, as -- as will be also the fact that so  
17 many people complained about him and there are no other  
18 complaints about any other officers during this period of time,  
19 or otherwise, as far as we know, doing that kind of thing in  
20 the search. Okay?

21 When they make the complaints, there's a whole process  
22 that the complaints go through. They -- There's a -- what they  
23 call an informal review where a staff member who's close around  
24 this situation where the whatever events took place, sits down  
25 with the officer -- with the prisoner and asks him what it's

## OPENING STATEMENT / CUNNINGHAM

1 about.

2 And if they can't resolve it, the -- the prisoner on  
3 his -- on the written grievance form -- And you'll see some of  
4 those forms. They're called 602s. That's a CDC serial number  
5 and they've got a million forms and these are the forms, 602s,  
6 that they use.

7 He says he's dissatisfied. The case then goes to what  
8 they call the second level. And now it's looked at in a more  
9 formal way by a higher ranking officer.

10 And they always say they -- they -- they call -- These  
11 complaints, we call it 602s, are entitled in the institution  
12 Inmate Appeal. So everything is an appeal from that first  
13 process of informal discussion with a local or Security Officer  
14 or somebody like that. Maybe even the officer. Many times  
15 it's the officer with whom you have the grievance against sits  
16 down with you and try to straighten it out. And of course they  
17 have to do that.

18 But when they have a staff complaint, the prisoner is  
19 complaining specifically about some kind of misconduct by the  
20 staff member or some injury received or whatever against the  
21 staff member.

22 They often do what they call a bypass and they'll stamp  
23 the form "Bypass," and this means it goes right to the second  
24 level.

25 And then there's a third level which is -- is -- that it

## OPENING STATEMENT / CUNNINGHAM

1 goes to the Director's office, the Director of the CDC, our  
2 California Department of Corrections and Rehabilitation in  
3 Sacramento. And the results of whatever's in the file,  
4 whatever's been done at the institution, are reviewed and then  
5 a decision is made and given back to the inmate.

6 Inmate. Let me parenthetically say they're all called  
7 inmates. They're always called inmates. They're addressed as  
8 inmates in formal papers. They won't use their first name and  
9 say Inmate Cleveland, Inmate Jones and a number. So they  
10 become used to thinking of themselves as inmates.

11 I try to never use the word unless I have to. I call them  
12 prisoners because I think the "inmates" is a demeaning kind of  
13 a -- it's a -- it's part of a process that reduces them to  
14 something, you know, special if not less than human, and it  
15 objectifies them. All right? They're objectified because  
16 they're in prison.

17 There are security rules in prison. They get searched all  
18 the time in prison. This is the way prison life goes. But  
19 this is what -- The rules, then, that protect them from abuse  
20 in that circumstance, in that setting, become all that more  
21 important, as you'll see, in the Eighth Amendment. Prohibition  
22 of cruel and unusual punishments is the Constitutional basis  
23 for those protections.

24 And what we're doing in a civil rights case is considering  
25 whether a violation has occurred -- occurred. You're actually



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1 the agency by which the Constitution is enforced by private  
2 parties when they -- when there is a complaint of wrongdoing by  
3 an official. So that's what this is. That's the  
4 Constitutional provision that's involved.

5 What you'll learn in this case is that complaints by these  
6 men and complaints by a number of others and petitions, in  
7 particular a petition that was filed towards the beginning of  
8 this sequence of -- of complained-of searches was filed by Ivan  
9 Cleveland with -- and it was styled in such a way that a number  
10 of other prisoners could sign it. And there were 80 or 90,  
11 dozens of prisoners -- and you'll see that document -- signed  
12 their names and numbers to his statement that Officer Abanico  
13 was doing these searches in this wrong way.

14 You'll see there's -- between his and any of the other  
15 complaints that you get to see, some you'll -- you know,  
16 there'll be some by play with the Court as to which ones you  
17 see and which ones you don't, but I'm certain you'll see that  
18 one.

19 And you'll see that there were all these people  
20 who . . . laid their names on the line, who -- who -- who took  
21 a stand about these searches by this officer and -- and  
22 demanded, so to speak, that they -- the institution, the  
23 administration, do something about it.

24 And you'll hear from the prisoners that that's not, you  
25 know, a trifling thing when you make a complaint against a

## OPENING STATEMENT / CUNNINGHAM

1 staff member. You often are told, "Well, if you're going to  
2 persist in this complaint, we're going to have to put you in  
3 the hole in order to protect you."

4 Protect you from what, you might ask? Well, from some  
5 retaliation, apparently, by the staff.

6 They were -- Many of them on many occasions were -- were  
7 threatened with that, and they stood firm and -- and not all of  
8 them -- they didn't -- I don't think any of them went to the  
9 hole immediately because of filing the complaint, even though  
10 they were threatened.

11 But you'll also learn that after this petition was filed,  
12 with all these names on it, that the security squad came and  
13 called all these guys that had signed it and one by one told  
14 them, "You'd better take it back or you're going to the hole."

15 And they had a video camera so that they could record the  
16 statement of -- of each inmate recanting his subscription to  
17 the petition, because of the threat, a guy who said, "I'm  
18 getting ready to go to the Board. I can't have this on my  
19 record. You know, you've got to excuse me. I can't stick with  
20 it."

21 Some of them did; some of them didn't. There -- There --  
22 We don't have any numbers or any particulars about that, but we  
23 know that happened. Ivan Cleveland will testify about it. He  
24 was there when it happened.

25 The -- The . . . The appeal process, then, that they had

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1 to go through is -- is this series of steps. But there is a  
2 principle that -- and a rule within the institution that if  
3 you're dealing with a complaint against a staff member, the  
4 prisoners don't get to hear the outcome. If action is taken or  
5 not taken, it's not announced to them. It's not -- They don't  
6 get something back and say this is how this thing came out.

7 If -- If the -- If a -- If a staff member that they  
8 complained about tells them what happened in the complaint, one  
9 way or another, then they find out. Or if it's about some  
10 certain practice that's going on and in the end they find out  
11 in that kind of a way.

12 But there's no -- The process itself is set up in such a  
13 way as to keep the information from them. And you can  
14 understand that there's, again, a security concern and -- and  
15 a . . . a concern about the relations between the prisoners and  
16 the staff.

17 The Supreme Court said in a case that -- in a prison, the  
18 prisoners and the guards live in a state of unremitting  
19 attention. And this is certainly true because there's such a  
20 vast difference in the power positions.

21 And the -- And the prisoners are at risk of getting in  
22 trouble in such a way it goes on their record and then it  
23 goes -- then the Parole Board sees it. Then it prejudices them  
24 in terms of job assignments. It gets, you know -- There's all  
25 kind of consequences to it.

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1           And -- And the -- So the tension between the two sides  
2   is -- is -- is not between equals; it's between the dominant  
3   and the submissive side. It's between the people with the  
4   power and people without it.

5           They're not entirely without power. There's things they  
6   can do, but there's consequences also.

7           You'll hear one or more of them say, you know, things have  
8   changed in the recent years in terms of the tightness of the  
9   way things are run. "If -- If somebody had done that to me in  
10   a search 25 years ago, I'd have turned around and punched them  
11   out, but I didn't dare do that here, and it's been impressed  
12   upon me in the years in between that it wouldn't ever be worth  
13   the consequences." As much as you might be upset about what  
14   this guy did or was doing, you have to contain yourself.

15          Now, they don't -- they didn't contain themselves. You'll  
16   hear the defense say, "Well, they've all testified -- or  
17   several of them have testified that any grabbing of their  
18   genitals or squeezing was quick, two or three seconds, and,  
19   therefore, what difference does it make, you know? Tough  
20   luck." I mean, you're in prison.

21          But the reason it was so short is because they did come  
22   off the wall. They did jerk away from the guy. "What are you  
23   doing? What's your problem?" You know, it was a shock. "Get  
24   back on the wall, sir. Get back on the wall."

25          And when he has you on the wall, he can lean his arm, his

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1 elbow, in your back and then search you. He can search you  
2 with two hands what he ought to do, on your legs, on your arms,  
3 your front and back, but he can also put his elbow in your back  
4 and jam you against the wall so he knows that he's got control  
5 of you and then do the search with one hand, whatever he's got  
6 left to pat down.

7 Now, you have to think of anatomy. We're talking about  
8 male anatomy.

9 There's an instruction and a strong point that you'll hear  
10 from the defense is, well, they had more or less . . .  
11 escalated the search technique recently, reasonably enough so  
12 that Officer Abanico will claim this was the way he was trained  
13 in the Academy a short time before he went to work at Soledad,  
14 that in order to counteract the threat of contraband or the  
15 possibility that contraband would get through, they were taught  
16 to do what they call, quote-unquote, cup the groin. Cup the  
17 groin.

18 Now, the cup, the understanding is a cupping of the hand  
19 flat. But if you think about the anatomy, the legs come up in  
20 a V. The space between the legs in the V, that's the groin.  
21 You can -- You're not supposed to look up in the dictionary but  
22 that's where the groin is.

23 In front -- If he has his back to you, in front of that  
24 are his genitals. But you can't really cup your hand up there  
25 because it comes to a V. So you're going to turn your hand one

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1 way or another, and if you think about it, if he's coming up  
2 the leg, up the thigh, the inside hand is going to reach the V  
3 and be stopped there, and anything that's above that, such as  
4 something sewn into the underwear, a pack of dope or, you know,  
5 whatever, you're going to feel it at that point when underwear  
6 goes against the groin.

7 Now, I told you this ain't -- it's not a pleasant subject  
8 matter, but these details are important because the claim is  
9 going to be that they could -- all they were -- all he was  
10 doing was cupping the groin or cupping the genitals, and these  
11 guys just had to learn to live with that. That's the way it's  
12 done.

13 You'll hear -- I believe you'll hear the Warden testify --  
14 the former Warden -- that when he found out they were doing  
15 that, he was shocked. Why was he shocked? Because he'd been  
16 in the system 30 or 40 years and he knew that this is a  
17 volatile thing. This is a thing -- It's an event to begin with  
18 the search. It's unpleasant and . . . the feeling about  
19 vulnerability and the feeling about protecting the genitals is  
20 such that, you know, it can blow up easily.

21 It's, among other things, a credit to the restraint that  
22 these men had developed after years in prison, and a credit  
23 to -- or a result of the strength of the disciplinary regimen  
24 that they, rather than turning around and socking the guy, they  
25 endured it. I mean, except to the extent that they pulled

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1 away.

2 Now, a couple of them will tell you they pulled away, and  
3 they refused to be searched by this officer again. And there  
4 again, you're disobeying a direct order, so they took the risk  
5 of going to the hole when they did that, but you -- in the  
6 particular cases, none of them did.

7 One of them was locked up in a . . . briefly on the  
8 corridor in what they call the cage, where they put anybody  
9 that they're going to have -- have a special problem with that  
10 they're going to deal with.

11 An officer claimed that he pulled him over because he was  
12 wearing a -- a inmate fashion -- inmate fashion earring, which  
13 is against the rules. And so he spent a day, or the shift,  
14 whatever it was, in the cage, and then he was written up for  
15 that on another form, it's called a 115, and charged with --  
16 with this wrongful possession of this earring.

17 But when he had a hearing, there was the other officer who  
18 was present said there wasn't any earring, so he was  
19 exonerated. But he was -- He has the 115 in his record, and he  
20 will spend that time locked up.

21 So the -- the . . . You'll find -- You'll learn that, in  
22 the process of the appeals, all the appeals that are made  
23 against them -- I believe it's 18 in this two-year --  
24 one-year -- 13-month period. They started in August of 2006  
25 and ran all the way till -- I believe the last one was filed in

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1 the -- toward the end -- September or October of '07 with the  
2 exception of one other that was filed later in an incident that  
3 seemed to be a sequel.

4 But the fact is that the searches that everybody was  
5 complaining about stopped at a certain point toward the end of  
6 2007, after 12, 13, 14 months of constant complaints, all of  
7 which were rejected. All the complaints, including the ones  
8 that were signed by dozens of prisoners.

9 There was one of those in October of '06, there was  
10 another one in June of '07, and they were . . . they were  
11 turned down. They were denied. They were rejected as appeals.

12 And the excuse -- There was a kind of double excuse always  
13 that he's only searching you the way he's been trained. How  
14 they thought he knew he didn't go beyond the way he was  
15 trained, I don't know, but they accepted his word for it.

16 And whoever looked into it after the Warden was presented  
17 with the first petition, and who was concerned about that for  
18 the reason that I stated, because of his experience, and he had  
19 to learn at that point that this is how we do it now. And he  
20 was very dubious but he accepted that, obviously, that's how  
21 they do it now.

22 They said the searches were all by the book. And  
23 furthermore, "You're not presenting us enough -- enough  
24 evidence. Your -- Your complaint could not be substantiated."

25 Well, how would you substantiate in the course of such a



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1 search if the guy grabbed the -- the person, they grabbed him  
2 or not or squeezed him or not. It's over, and who -- what  
3 other substantiation would there be besides his word that he  
4 did it -- that it happened?

5 If they had -- I'm sorry. Excuse me just a sec. Let me  
6 get a little water here.

7 (Pause in proceedings.)

8 **MR. CUNNINGHAM:** There was no substantiation available  
9 really and it was just something to say denying the appeal.

10 Some of it is more elaborate and they see some of that  
11 language. They're also going to say in every one of those  
12 cases, "Your appeal was partially granted as an inquiry was  
13 made into your complaint." The very fact of looking into it at  
14 that second level is -- is considered and used as a partial  
15 grant of an appeal.

16 So now their statistics look okay; right? They're  
17 partially granting all these appeals because they actually see  
18 what they're about and maybe they go talk to somebody about it.  
19 They do something.

20 This is supposed to be a granting but it's really a -- a  
21 jargon -- misuse of jargon really because nothing was granted.  
22 No relief. The relief was denied.

23 Sometimes they make a big thing. "Oh, your appeal was  
24 partially granted." Some people think, when they see the  
25 paper, "Wow, my appeal was partially granted," but nothing

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1 happened, or I don't know what happened because it was about a  
2 staff member and they never tell you, anyway.

3 But you'll see -- I believe you'll see at least one where  
4 it says "partially granted" in that you were looked into.

5 Okay. The Warden, when he got the -- when the first group  
6 appeal, the petition, was brought to his attention, he had --  
7 you know, he spoke to Associate Warden, I think -- I'm not  
8 sure -- a Deputy Warden. He spoke to a couple of different  
9 people and sent them to find out what they could.

10 In particular, he sent a Lieutenant Biggs, who's the head  
11 of the ISI, Institutional Security Inspectors, or something  
12 like that, who they call the goon squad. These are the people  
13 that came down and demanded that the guy that signed the  
14 petition take it back.

15 Lieutenant Biggs, in order to investigate how Abanico did  
16 his searches, testified in deposition that he went down and did  
17 some searches -- spent part of his shift in the corridor near  
18 the place that Abanico was working and did searches and watched  
19 him out of the corner of his eyes but didn't see anything wrong  
20 with what he was doing.

21 Well, I don't think you would do that if the Lieutenant is  
22 right down the way doing the same thing. And you don't know if  
23 he's -- that he's observing you necessarily. I don't think he  
24 told them, but he's there.

25 And if something happens, if you cause somebody to jump

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1 off the wall and holler at you, the Lieutenant's going to be  
2 there, so he didn't do it.

3 We're not saying he did it every time he searched anybody.  
4 We are saying he did it a lot and all those people that signed  
5 the petition claimed he did it to them. And all the people  
6 filed the 602s, claimed he did it to them, and these guys claim  
7 he did it to them.

8 A couple of them only had one chance. Another one, Huff,  
9 said he pulled him over again and again. And he wouldn't grab  
10 them those times; he would just rub them real hard underneath.

11 There -- There wouldn't be a reason to pull the same guy  
12 over again and again unless you're messing with him.

13 So that's the essence of it. I mean, that's what I think  
14 you're going to learn here, is, those searches like that took  
15 place and -- and -- and they didn't do anything about it.

16 Now, if you decide that he didn't abuse them, he didn't  
17 cross the line, he didn't wrong them, do this in a wrong and  
18 maybe a prurient way, that will be the end of it.

19 But if you decide that he did, you're also going to have  
20 to decide whether the Warden is coresponsible with him because  
21 he -- you know, because they white-washed all the complaints.

22 They just rejected them, and he was in on that process and  
23 he was in charge. And if it's his responsibility to make sure  
24 that -- and -- and where he's on notice that some  
25 Constitutional violations may be taking place, it's up to him

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1 to take -- to take steps to make sure they don't or that they  
2 ended.

3 And he said he didn't do that unless he did it at the end  
4 of the 13 months or whatever it was, because he does -- he did  
5 testify that, at some point, which he can't remember and  
6 you'll -- there's no record of it, but that he spoke with  
7 Abanico and he told him, "You'd better find a way to do these  
8 searches without getting everybody so angry with you and  
9 without making people upset and without filling my office with  
10 complaints and petitions and stuff."

11 And after that, apparently, it stopped. I say we don't  
12 know the precise timing but we do know it's all happening in a  
13 span of time and then it was over. There hasn't been another  
14 complaint against Abanico since then.

15 In all these years, I believe he's probably -- I don't  
16 know. He may be a Sergeant by now. He's a very upstanding  
17 citizen by his peers. I'm sure he has a wife and family. He's  
18 been in the service.

19 He's, you know, a very presentable man, but he has this  
20 problem. We can't even say that it wasn't, you know, a special  
21 problem that he had. It might have just been an aggression  
22 problem; this is the mode that he used. And he might have just  
23 been thinking that he had to show these guys who was boss and  
24 this was the mode that he did.

25 Nobody else did it. Nobody else had a complaint against

## OPENING STATEMENT / CUNNINGHAM

1    them.  And you can believe there are plenty of officers who  
2    make their -- whose random clothed-body searches for security  
3    purposes are done in a vigorous way.  There's some where  
4    they're not.

5           But there are some where the book is followed and the book  
6    says you don't grab the genitals.  You don't squeeze the  
7    scrotum.  You don't do that stuff.  Obviously, the training  
8    would be you've got to watch out not to do that stuff.

9           So I think you're going to see very clearly that he was  
10   over the line again and again, that that was an abuse that  
11   created the situation that violated the Eighth Amendment  
12   because these guys had no recourse.

13          And that's partly the warden's fault also because he  
14   didn't get them in the very first day and saying, "What's going  
15   on here?  How come all these people have signed a thing against  
16   you?"

17          He didn't have anybody else to do that, either.  He let it  
18   go on.  He hooked up with Lieutenant Biggs saying, oh, they  
19   must be doing some crooked stuff and he's interfering with --

20               **MR. QUINN:**  Objection, Your Honor:  Argumentative.

21               **THE COURT:**  Sustained.

22          Counsel, this is --

23               **MR. CUNNINGHAM:**  All right, Judge.

24               **THE COURT:**  This is opening statement.

25               **MR. CUNNINGHAM:**  Um-hmm.

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1           **THE COURT:** Please explain to the jury what your  
2 belief is that the evidence will show.

3                               (Pause in proceedings.)

4           **MR. CUNNINGHAM:** Hang on just a minute.

5                               (Pause in proceedings.)

6           **MR. CUNNINGHAM:** There -- There was -- Ivan Cleveland  
7 in particular is the prisoner who initiated this lawsuit. He  
8 did it on his own representing himself but talking about the  
9 thing that was happening to lots of prisoners.

10           He's the same guy who got up the first petition. He also  
11 initiated -- attempted to initiate a case in the County Court  
12 back then in the fall of '06 to -- to see if he could get some  
13 intervention from there.

14           At that time, he -- along with the petition that he filed,  
15 he filed about 16 or 17 affidavits that were handwritten. He  
16 handwrote a form --

17           **MR. QUINN:** Objection, Your Honor.

18           **MR. CUNNINGHAM:** -- and there --

19           **THE COURT:** Hold on, Mr. Cunningham.

20           **MR. QUINN:** This is hearsay; relevance. It's also the  
21 subject of a motion in limine --

22           **THE COURT:** All right.

23           **MR. QUINN:** -- previously.

24           If we could request a side bar, that would be the most  
25 efficient.

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1           **THE COURT:** Okay.

2           **MR. QUINN:** It should be brief.

3                   (Side bar heard, commencing at 1:45 PM.)

4                   (Whereupon, the following proceedings were.

5                   Heard in the presence of the jury at 1:47 PM:)

6           **MR. CUNNINGHAM:** You'll learn there was, in a couple  
7 of cases at least, what the prisoners regard as retaliation  
8 against them for the complaints. There was not -- In one case,  
9 Abanico was involved in; in another case, he wasn't.

10           There's no telling really, except for the coincidence,  
11 whether this happened because of them making trouble for him  
12 about this practice.

13           Now, I'm going to be done now and -- and counsel will talk  
14 to you about what they think the case is going to show, and  
15 then we'll start.

16           Mr. Trask is going to testify and, Judge, we -- our plan  
17 is to -- for him to testify first just about the general  
18 circumstances in the prison. Then I think we would interrupt  
19 his testimony, if the Court will allow us then, and let him  
20 come later in the sequence of prisoners telling about their  
21 individual case.

22           **THE COURT:** All right.

23           **MR. CUNNINGHAM:** Okay. And so I invite your strong  
24 attention to the details of this evidence, and I hope that when  
25 you have heard it all, you'll understand that this is a bad

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1 thing and it happens all the time.

2 **THE COURT:** Mr. Quinn, opening.

3 **OPENING STATEMENT**

4 **MR. QUINN:** Good afternoon, ladies and gentlemen. My  
5 name is Michael Quinn. I'm a Deputy Attorney General for the  
6 State of California and I represent the defendants in this  
7 matter.

8 Ladies and gentlemen, this is a simple case. It involves  
9 a Correctional Officer who was doing his job at a correctional  
10 facility in Soledad, California, a job that involves among  
11 other things conducting clothed-body -- random clothed-body  
12 searches of inmates as they moved between locations in the  
13 prison.

14 Prisons in California can be chaotic and violence places,  
15 and officers routinely conduct clothed-body searches in order  
16 to prevent inmates from smuggling and transporting contraband,  
17 such as weapons and drugs between locations within the prison.

18 The evidence will show that, as part of a clothed-body  
19 search, officers like Officer Abanico are told to cup the  
20 groin. Cupping the groin is essential during a clothed-body  
21 search because inmates oftentimes attempt to conceal contraband  
22 below the waist, in the groin area.

23 Failing to conduct a thorough search places the entire  
24 institution at risk, because the weapons or other contraband  
25 can be used to attack other inmates or correctional staff at



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1 the prison.

2 Now, as Mr. Cunningham mentioned, plaintiffs in this case  
3 have alleged that the clothed-body search -- searches that  
4 Abanico conducted violated the Eighth Amendment.

5 But in this case, the evidence will establish that  
6 Defendant Abanico did not violate the Eighth Amendment during  
7 the clothed-body searches. To the contrary, he conducted the  
8 clothed-body searches in accordance with Departmental policy,  
9 in accordance with State law, which requires some contact with  
10 the groin area in order to accomplish the purpose of the  
11 search.

12 The evidence will show they he did not sexually abuse,  
13 harass or molest these inmates during these searches. To the  
14 contrary, the contact with the groin was for a limited  
15 duration, one to two seconds for the most part.

16 And the evidence will also indicate that he did not place  
17 his hands beneath the clothing of the inmates. He did not say  
18 anything of a sexual nature to the inmates, and he did not  
19 physically injure these inmates during the searches.

20 In short, Officer Abanico was doing his job as required  
21 under the regulations. He was discharging his duties as a  
22 Correctional Officer.

23 Now, during the trial, you will hear from several  
24 defendants -- several witnesses who will speak on behalf of  
25 defendants. You will hear from a Correctional Lieutenant --

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1 Correctional Lieutenant Stoltenberg who works at the  
2 Department's training center in Galt, California.

3 He will explain to you how officers are trained to conduct  
4 clothed-body searches and the necessity of cupping the groin in  
5 order to conduct a thorough search.

6 In addition, you'll here from Officer Abanico himself. He  
7 will testify regarding how he was trained to conduct the  
8 searches and how he actually conducts the searches at the  
9 Correctional Training Facility where he's worked for nearly a  
10 decade.

11 In conclusion, ladies and gentlemen, I want to  
12 reemphasized that this case is about an officer who was doing  
13 his job, who was conducting clothed-body searches as he was  
14 required to, and there was no evidence that he harassed,  
15 molested or abused the inmates during the search.

16 Because the plaintiffs' rights have not been violated  
17 under the Eighth Amendment, the defendants request that a  
18 judgment be rendered in their favor.

19 And I thank you for your attention.

20 **THE COURT:** Thank you, Mr. Quinn.

21 Mr. Cunningham, your first witness.

22 **MR. CUNNINGHAM:** Judge, our first witness is plaintiff  
23 Kenneth Trask.

24 **THE CLERK:** Will you please come over here and take  
25 the witness stand.

**TRASK - DIRECT / CUNNINGHAM**

1           **THE COURT:** I noticed some of the jurors fanning  
2 themselves. It is a little hot in here. I did ask that the  
3 air conditioning to be turned up a little bit. Hopefully,  
4 knowing the government, that will mean it will go from really  
5 hot to really cold. It's difficult, I guess, to control it.

6           **THE CLERK:** Will you please stand and raise your right  
7 hand.

8           **MR. CUNNINGHAM:** Excuse me, Judge. Can the clerk and  
9 I speak to you for one second here?

10          **THE COURT:** Well --

11          **MR. CUNNINGHAM:** Just -- I'm sorry. I forgot to do  
12 this.

13               (Sidebar conference heard but not reported.)

14          **THE CLERK:** Can you raise your right hand.

15                       **KENNETH TRASK,**  
16 called as a witness for the Plaintiffs, having been duly sworn,  
17 testified as follows:

18          **THE CLERK:** Please be seated.

19               Please state your full name for the Court and spell your  
20 last name.

21          **THE WITNESS:** My name is Kenneth Trask, T-R-A-S-K.

22          **THE CLERK:** Thank you.

23                       **DIRECT EXAMINATION**

24          **BY MR. CUNNINGHAM:**

25          **Q.** Mr. Trask, how old are you?

## TRASK - DIRECT / CUNNINGHAM

1     **A.**    I'm 57 years old.

2     **Q.**    You're a prisoner in the California Department of  
3    Corrections?

4     **A.**    Yes, sir.

5     **Q.**    How long have you been in there?

6     **A.**    Oh, this term, I've been in almost 30 years.

7     **Q.**    All right. And you had a term before that?

8     **A.**    Yes, sir.

9     **Q.**    Okay. And are you eligible for parole?

10    **A.**    Yes, sir.

11    **Q.**    Are you working on your parole?

12    **A.**    Yes, sir.

13    **Q.**    Okay. You were at CTF, California Training Facility,  
14    Soledad in 2006-2007?

15    **A.**    Yes, sir.

16    **Q.**    How long were you at Soledad?

17    **A.**    I spent about 10 years there.

18    **Q.**    Uh-huh. And when did you leave there?

19    **A.**    I left in September . . . Well, no. I left in April 24th  
20    of 2008.

21    **Q.**    Okay. That was shortly after this -- you began -- you  
22    became involved in this case; is that right?

23    **A.**    Yes. I spent eight -- eight months in the hole, and I was  
24    transferred from the hole to --

25           **MR. LEWIS:** Objection, Your Honor, as to the use of

## TRASK - DIRECT / CUNNINGHAM

1 the word "hole." It's not a recognized term within the  
2 California Department of Corrections and Rehabilitation.

3 **THE COURT:** Overruled.

4 **MR. CUNNINGHAM:**

5 **Q.** What is the hole?

6 **A.** The hole is, to explain it, is a prison inside of the  
7 prison. They call it administrative segregation where you're  
8 separated from the other inmates in the institution. You have  
9 no contact with other inmates. You can't use the phone, and  
10 you're locked up basically 24 hours a day, unless you choose to  
11 go out into the yard, and you can go out to the yard sometimes  
12 in the morning and sometimes in the morning -- sometimes in the  
13 afternoon, and you're allowed to either be on the yard by  
14 yourself or you can be out there with other inmates.

15 **Q.** All right. Before you went to the hole, were you -- where  
16 were you assigned to -- your living quarter?

17 **A.** I was assigned to D Wing.

18 **Q.** Okay. And is B Wing (sic) one of the wings that empties  
19 on to the main corridor?

20 **A.** I was in D Wing.

21 **Q.** D Wing. I'm sorry.

22 **A.** Yeah, delta.

23 **Q.** Can you describe for the jury the layout of the corridor  
24 and the wings?

25 **A.** Yes. The corridor is about maybe a quarter of a mile

## TRASK - DIRECT / CUNNINGHAM

1 long. You have 10 different wings inside the corridor that  
2 faces the corridor.

3 One of the wings is the hold, which has no communication  
4 or anything with other inmates. The other wings are -- house  
5 at least 250 inmates in each one.

6 The two bigger wings, F and G, houses 300 inmates. And  
7 this corridor is like -- it's like a little city. Like  
8 Mr. Cunningham was telling you, it's where we exit our  
9 buildings and go to work. We go to work, we go to hospital, we  
10 go to the yard, we go to the canteen, and, you know, other  
11 places. You can't -- You can't get to these other places  
12 without going through the corridor.

13 Q. Okay. And the corridor runs east and west; is that right?

14 A. Yes, sir. It runs from, yeah, east and west.

15 Q. Okay. So -- And which end is the yard on?

16 A. That's on the west side.

17 Q. Okay. And where is the mess hall located?

18 A. The mess hall is more, like, in the center of the corridor  
19 between -- It would be centered between west and east.

20 Q. Okay. And if it's running west to east --

21 A. Um-hmm.

22 Q. -- a quarter of a mile --

23 A. Yes, sir.

24 Q. -- then there's wings on the north side and wings on the  
25 south side?

## TRASK - DIRECT / CUNNINGHAM

1    **A.**   Well, down at the lower corridor, there's only -- On the  
2    left side -- By the way, the corridor itself is about maybe 15  
3    to 20 feet wide.

4    **Q.**   About from you to me?

5    **A.**   Yes, about there.

6    **Q.**   Is that about right?

7    **A.**   Yes. So you have -- On the west side, you have two -- You  
8    have two wings that's on the left side of the corridor, which  
9    will be F and G. All the other wings are on the other side of  
10   the corridor.

11   **Q.**   The housing wings.

12   **A.**   They're housing wings as well --

13   **Q.**   Yeah.

14   **A.**   -- but they're outside the corridor.

15   **Q.**   I understand. And then places like the infirmary or the  
16   counselor's office or the school --

17   **A.**   Mostly are on the left side of the corridor, yes, sir.

18   **Q.**   Further down to the --

19   **A.**   Yes, sir.

20   **Q.**   -- east?

21   **A.**   Yes.

22   **Q.**   Okay. And D Wing is on the south side?

23   **A.**   D Wing is on the -- D Wing is the second wing from the  
24   yard, which you have -- You have E wing, D Wing, C wing, and  
25   then you go down the corridor.

## TRASK - DIRECT / CUNNINGHAM

1        Each wing -- During these moments, one of the officers  
2        from those wings, his job was to go out and stand in front of  
3        the wing. When the inmates exit the wings, his job was to make  
4        sure they were going where they're supposed to go.

5        For instance, if I came out of the wing and I turned west  
6        to go to the yard, but I was supposed to be going east, then I  
7        would be stopped and asked where I was going.

8        **Q.**    How do they know which inmates are supposed to go where?

9        **A.**    Well, normally the officers who are on the outside of  
10       the -- a wing are familiar with the inmates in the wing.

11       So with the different releases, the officer know -- they  
12       know if it's work time you're going to work. If you have a  
13       ducat to go to hospital, so to speak, he know that you're going  
14       to the hospital.

15       Some of the officers outside the wing will ask you where  
16       you're going. They want to see your ID, see your pass, so they  
17       can make note of where you're going.

18       **Q.**    What's a ducat?

19       **A.**    A ducat is a little form that you get saying that you're  
20       being released to go to the hospital, or you're being released  
21       to go to laundry, or you're being released to go maybe on a job  
22       interview, so . . .

23       **Q.**    Is that the same as a pass?

24       **A.**    It is a pass, yes, sir.

25       **Q.**    Okay. A pass is a ducat. A ducat --



## TRASK - DIRECT / CUNNINGHAM

1     **A.**    Yes.

2     **Q.**    -- is a pass?

3     **A.**    Yes.

4     **Q.**    Okay.  So when you come out of your cell and you're going  
5     someplace, you have to bring an I.D. you mentioned?

6     **A.**    You have to have your I.D. on you at all times.

7     **Q.**    Okay.  And what about a ducat?  You need a ducat to go to  
8     the yard?

9     **A.**    No.

10    **Q.**    You need a ducat to go --

11    **A.**    You only need a ducat when you have appointment.  You may  
12    have appointment for the hospital, you may have appointment to  
13    report to the Sergeant's office, to the counselor's office, or  
14    somewhere like that.

15    **Q.**    Okay.  So everybody who's passing in the corridor doesn't  
16    have a deduct.

17    **A.**    No, sir.

18    **Q.**    They don't have to check deducts.

19    **A.**    No.

20    **Q.**    Okay.  And what -- what -- what is the staffing of a wing,  
21    like the wing you were in?  What kind of officers do they have  
22    in there?

23    **A.**    Well, normally there's -- there's three tiers in the wing.  
24    You have at least --

25    **Q.**    Three or four?

## TRASK - DIRECT / CUNNINGHAM

1   **A.**   Three or four, yes.  You have at least three officers in  
2   that wing.

3           You also have -- Again, like, one of the officers leave  
4   when there's movement, but there's normally at least three  
5   officers in each wing.  It may be more at a time.

6   **Q.**   Do they have a Sergeant in the wing?

7   **A.**   No, sir.

8   **Q.**   Where is the nearest Sergeant?

9   **A.**   According to D Wing, the counselor's office is between  
10   E Wing and D Wing.  The sergeant's office is down in the center  
11   corridor.

12   **Q.**   Okay.  And that Sergeant, is he responsible for the  
13   corridor?

14   **A.**   You have different sergeants.  You have -- The officers in  
15   the corridor are assigned to a certain part of the corridor.  
16   That corridor may have a Sergeant for that part.

17           But, like, for instance, E Wing, F Wing, G Wing and D Wing  
18   was just one part of the corridor where a Sergeant will be  
19   appointed to that part and that part only.

20           After you go down to report to other wings, you have  
21   another Sergeant for that.

22   **Q.**   Okay.  So it's like those last four wings just before the  
23   yard, there's one Sergeant there?

24   **A.**   Yes, sir.

25   **Q.**   Another Sergeant in toward the middle?

## TRASK - DIRECT / CUNNINGHAM

1    **A.**   Well, all Sergeants will be assigned to the same  
2    Sergeant's office. But the Sergeant that's responsible for D,  
3    E, C and G would be one particular Sergeant.

4    **Q.**   Okay.

5    **A.**   But they all will be -- They all will be in the same  
6    office.

7    **Q.**   And when -- You said when there's going to be movement --  
8    There's certain times of the day when there's movement of  
9    prisoners out of the cell blocks into the corridor; right?

10   **A.**   Yes, sir. There's movement in the corridor all the time.  
11   It's like a little city. Somebody's always up and down the  
12   corridor.

13   **Q.**   Okay. But there's certain times when there's a lot of  
14   people going; right?

15   **A.**   Yes.

16   **Q.**   Going to the mess hall; going to the yard.

17   **A.**   Yes.

18   **Q.**   At more or less a point of time.

19   **A.**   Yeah. Your yard release time can vary. It could be  
20   between 8:00, something like that. Work release, chow release.  
21   You know, you have different releases --

22   **Q.**   Okay.

23   **A.**   -- where the corridor is really crowded. The only time  
24   the corridor isn't crowded is during staff changing on their  
25   job.

## TRASK - DIRECT / CUNNINGHAM

1 Q. Shift.

2 A. Shift change, yes, sir.

3 Q. Shift change.

4 And so did you say the tier officers come on down to the  
5 corridor when people are coming out of the tiers?

6 A. Well, no. The tier officers stay in the building.

7 Q. One?

8 A. You have one officer that is assigned to the corridor. So  
9 he will go out and stand in front of his building.

10 Q. Uh-huh.

11 A. If you were assigned to D Wing, when there's a release,  
12 you go out and stand at G -- D Wing and vice versa with other  
13 buildings.

14 Q. Okay. And besides those officers that come out of wings  
15 during the mass movement --

16 A. Um-hmm.

17 Q. -- in the corridor, are there other officers who are just  
18 assigned to the corridor?

19 A. Yes, sir. You have what's called S&Es. I couldn't tell  
20 you what S&E stands for but these S&Es, they're back and forth,  
21 up and down the corridors, and doing other jobs inside the  
22 corridor in the prison.

23 Q. All right. And -- And is it the responsibility of all the  
24 officers who may be in the corridor to make random clothed-body  
25 searches or just some of them?

## TRASK - DIRECT / CUNNINGHAM

1     **A.**    Yes.  Any officers can make a random body search.

2     Normally the officer that's assigned to your building when  
3     you're coming out of the building, he's the one that searches  
4     that particular building.

5           For instance, if I'm in D Wing and the D Wing officer is  
6     outside that building, he searches the inmates coming out.

7     When we're coming from the yard, the officers in the corridor  
8     may search any inmate when he's going down the corridor to  
9     report to whatever building or wherever he's going.

10    **Q.**    If there's a release from the Wing area to the corridor --  
11    I'm sorry -- to the yard, or to the chow hall or to work, do  
12    all -- does everybody get searched?

13    **A.**    No, sir.

14    **Q.**    How many people -- If you come out, go to the yard, how  
15    many people will get searched on the way?

16    **A.**    I guess there's --

17           **MR. LEWIS:**  Objection:  Calls for speculation; also  
18    assumes a fact not in evidence, Your Honor.

19                               (Pause in proceedings.)

20           **MR. CUNNINGHAM:**  Let me rephrase it.

21           **THE COURT:**  To the extent the witness can testify from  
22    his own personal experience of what he's saying, he may answer.  
23    To anything else, the objection's sustained.

24           **MR. CUNNINGHAM:**  Okay.

25

## TRASK - DIRECT / CUNNINGHAM

1 **MR. CUNNINGHAM:**

2 **Q.** In your experience, when -- when there's a release of a  
3 large number of prisoners from a given Wing or from the Wing  
4 you're in, how many of them would get searched?

5 **A.** Well, it depends on the officer. You know, some officers  
6 may, you know, let numerous inmates go by. But then you have  
7 other officers that may stop numerous inmates, so it depends on  
8 how many inmates the officer wants to search.

9 **Q.** And is it up to the officer -- As far as you know, is it  
10 up to the officer?

11 **A.** As far as I know, yes, sir.

12 **Q.** And do -- If you -- If the tier -- If the -- the Wing  
13 officer searches you, that's when you first come out?

14 **A.** Yes, sir, and he may search you when you going back in.

15 **Q.** Okay. Now, would some other officer further down search  
16 you also?

17 **A.** Well, normally if you've been searched coming out your  
18 building, if you go down the corridor and an officer wants to  
19 search, you can tell him, "I've been searched." Sometimes they  
20 will accept it; sometimes they won't.

21 **Q.** Okay.

22 (Pause in proceedings.)

23 **BY MR. CUNNINGHAM:**

24 **Q.** And . . . And in a -- in a ballpark or an average, say,  
25 in a month, during that time, those years while you were in

## TRASK - DIRECT / CUNNINGHAM

1 Soledad, how many times would you get searched -- random  
2 clothed search in the corridor?

3 **A.** Numerous of times. I mean -- You said once a day. It may  
4 not be once a day. Depends on who's in the corridor.

5 You can say maybe three to four times a week.

6 **Q.** Um-hmm. Is it fair to say that different officers do the  
7 search in different ways?

8 **A.** No, I wouldn't say that. I would say that most of the  
9 officers search in the same way. I never had a -- a problem  
10 with the way an officer would search me until Officer Abanico  
11 started searching me.

12 **Q.** Uh-huh. What do they do -- What's a normal search? Like  
13 a non-Abanico search, how does it proceed?

14 **A.** Well, they all proceed the same way. Some officers --  
15 I've been in searches where you were telling how we lean on the  
16 wall. Some officers would have you lean so far back you'd  
17 almost fall. You'd put your hands on the wall and you have to  
18 step back. You can step back to the point where just a little  
19 notch might tilt you over.

20 **Q.** Um-hmm.

21 **A.** But that depends on the officers. Officers like you say  
22 will have one hand on your back while they search you with one  
23 hand. But they will always start at the top and work their way  
24 to the lower back.

25 **Q.** Start up around your neck.

## TRASK - DIRECT / CUNNINGHAM

1     **A.**    Yes, sir.

2     **Q.**    Uh-huh.  And they search all the way down you?

3     **A.**    Yes, sir.  They will search -- They will search arms,  
4     legs, going down your body.

5     **Q.**    Um-hmm.  If they searched with one hand, is that because  
6     they have --

7     **A.**    Yes, sir.

8     **Q.**    -- the elbow or the hand back over you?

9     **A.**    Yes, sir.

10    **Q.**    If they search with two hands, do they just dispense with  
11    that?

12    **A.**    Yes.

13    **Q.**    Is there kind of way you know which way they're going to  
14    do it or any particular habit a given officer has?

15    **A.**    In that -- In that respect, you -- again, it depends on  
16    the officer.  You -- I knew all the officers, so their methods  
17    was mostly the same.  Again, the only different that I ever see  
18    or since I've been in prison, even up to now, was Abanico's  
19    method.

20    **Q.**    Um-hmm.  And when they search your legs, do they go -- do  
21    they -- how do they start?

22    **A.**    Well, they work their way down.  When it comes to your  
23    groin area and all that, they sweep down your groin area and  
24    keep going.  I've never had a officer that -- that lingered in  
25    that area.



## TRASK - DIRECT / CUNNINGHAM

1 Q. Uh-huh. When they're doing with two hands, they go from  
2 the groin right down the leg?

3 A. Yes, sir.

4 Q. To the foot.

5 A. Yes, sir.

6 Q. If they do one hand, how do they do both sides of the leg?

7 A. They do one hand if they holding you, or two hands sweep  
8 down the leg. Sweep inside and sweep outside and move on.

9 Q. All right. And when they come up to the top of the thigh  
10 with two hands, do they go all the way to the groin where they  
11 touch your crotch?

12 A. Sometime, yes.

13 Q. Uh-huh. And -- And would they do the one hand the same?

14 A. Yes, sir.

15 Q. And have you had -- Strike it.

16 You said you never -- you only had a -- the way Abanico  
17 did it was different --

18 A. Yes, sir.

19 Q. -- from the way the other officers did it?

20 A. Yes, sir.

21 Q. What was the difference?

22 A. Well, it was -- Abanico would linger in that area. He  
23 would squeeze the testicles and sometimes squeeze the penis.

24 Q. Okay. And all . . .

25 THE COURT: Counsel, I don't mean to interrupt but you

## TRASK - DIRECT / CUNNINGHAM

1 indicated that you --

2 **MR. CUNNINGHAM:** Yes. I'm stopping right here, Judge,  
3 with that.

4 **THE COURT:** It's up to you. It's your witness. I  
5 think you said you wanted to use him first for general --

6 **MR. CUNNINGHAM:** I do. I do.

7 **THE COURT:** -- and then --

8 **MR. CUNNINGHAM:** Let me just ask one further question.

9 **THE COURT:** Proceed.

10 **MR. CUNNINGHAM:**

11 **Q.** You were one of the people that collected signatures for  
12 one of the petitions; right?

13 **A.** Yes, sir. I did a petition that had 90 signatures on it.

14 **Q.** And that was in '07, June '07?

15 **A.** Yes, sir.

16 **Q.** Okay. And when you got those signatures, did you question  
17 all those procedures --

18 **A.** Yes, sir.

19 **Q.** -- as to -- as to whether they had, and did they all  
20 affirm to you at least that they've been searched by Abanico --

21 **A.** Yes, sir.

22 **Q.** -- in the same way?

23 **MR. LEWIS:** Objection: Hearsay, Your Honor.

24 **THE COURT:** Sustained.

25

## TRASK - DIRECT / CUNNINGHAM

1 **MR. CUNNINGHAM:**

2 **Q.** That's what you learned from the petition when you asked  
3 them sign the petition?

4 **A.** I would never let anybody sign if they wasn't searched by  
5 the --

6 **Q.** Or they didn't tell you at least.

7 **MR. LEWIS:** Objection, Your Honor.

8 **BY MR. CUNNINGHAM:**

9 **Q.** True or false: Didn't tell you; didn't make that claim.

10 **THE COURT:** It's hearsay. Sustained.

11 **MR. CUNNINGHAM:** Okay.

12 **THE COURT:** It jurors -- The jurors are instructed to  
13 disregard the last question and answer.

14 **MR. CUNNINGHAM:**

15 **Q.** During that time, those months from August of '06 to  
16 September-October '07, to your knowledge, where was Abanico  
17 assigned?

18 **A.** D Wing Corridor Officer. He would be the officer that was  
19 assigned to that Wing but would go out in the corridor and  
20 do -- do random searches.

21 **Q.** Okay. And the -- In the petition that you got together,  
22 were those prisoners that signed it all from D Wing?

23 **A.** Yes, sir.

24 **MR. CUNNINGHAM:** Okay. One moment, Judge.

25 (Pause in proceedings.)

## TRASK - CROSS / LEWIS

1           **MR. CUNNINGHAM:** I have no further questions of the  
2 witness at this time, Judge.

3           **THE COURT:** All right. There will be some  
4 cross-examination, and it will be subject to recall before the  
5 direct.

6           **MR. LEWIS:** Thank you, Your Honor.

7                           **CROSS-EXAMINATION**

8           **MR. LEWIS:**

9           **Q.** Good afternoon, Mr. Trask.

10          **A.** How you doing, sir?

11          **Q.** I want to ask a real quick question about some of the  
12 testimony you gave.

13           I believe you said that . . . that some of the officers  
14 mostly used the same methods, but they actually didn't; did  
15 they? You testified that some officers use one hands but other  
16 officers use two hands.

17          **A.** Yes, sir.

18          **Q.** Those are two different methods; aren't they?

19          **A.** If you want to call it two different methods. What I  
20 meant is, their method was different from Abanico.

21          **Q.** Well, their method was actually different from each  
22 other's method; wasn't it?

23          **A.** The two methods is the only methods I know, sir.

24          **Q.** So you're contending there's only three ways to search an  
25 inmate with one hand, with two hands and Abanico's way?

## TRASK - CROSS / LEWIS

1    **A.**    I don't know.  I'm saying the way -- You talking about my  
2    experience, so I --

3    **Q.**    So in your experience, you had -- you've been searched in  
4    multiple different ways; haven't you?

5    **A.**    I've been searched in the way that I just told you,  
6    three -- either two hands or one hand or the way Abanico  
7    searched me.

8    **Q.**    You said one time there was -- there was an arm in your  
9    back with their elbow?

10   **A.**    Sometimes.

11   **Q.**    So that's another way; isn't it?

12           **MR. CUNNINGHAM:**  Objection:  He's arguing with the  
13   witness, Your Honor.

14           **THE COURT:**  Overruled.

15           **THE WITNESS:**  Sometimes when they had the arm in the  
16   back, that's when they would use the one hand.

17   **MR. LEWIS:**

18   **Q.**    But arm in a back is like this with a hand and then  
19   there's also an elbow.  So those are two different ways;  
20   correct?

21   **A.**    I don't know -- I don't know.  My back is to the -- to the  
22   officer.  My hands are on the wall.  I don't know if it's an  
23   arm or elbow sometimes.

24   **Q.**    But you just testified there's times when you used hands  
25   and times when you used elbows.

## TRASK - CROSS / LEWIS

1     **A.**    Yes, sir.

2     **Q.**    Did they -- Let me ask the question.

3            Are you saying now you didn't actually know the search was  
4   being done to you?

5     **A.**    I'm saying at different times, it could be the arm;  
6   sometimes it could be a hand.

7     **Q.**    And other times, there could have been one hand and at  
8   other times, it could have been two.

9     **A.**    Yes, sir.

10    **Q.**    You testified Officer Abanico conducted 20 clothed-body  
11   searches on you between 2006 and 2008 while you were at a  
12   Correctional Training Facility; correct?

13    **A.**    Yes.

14    **Q.**    You don't remember any of those searches; do you?

15    **A.**    No. I remember one in particular.

16    **Q.**    What was that particular?

17    **A.**    That would be the night that he claimed that I threatened  
18   to kill him, and I was sent to the hole.

19    **Q.**    And was that day on September 13th, 2008?

20    **A.**    September 13, 2007.

21    **Q.**    In actuality, he didn't perform that search; did he?

22    **A.**    Yes, sir, he did.

23    **Q.**    He did?

24    **A.**    Yes, sir.

25    **Q.**    Were you deposed in this matter?

## TRASK - CROSS / LEWIS

1     **A.**    What's "deposed"?

2     **Q.**    Where you had a -- kind of a conversation with maybe  
3     Mr. Quinn in my office where he asked you a series of questions  
4     in front of a court reporter.  You were sworn an oath?

5     **A.**    Yes.

6     **Q.**    And your attorney was present; correct?

7     **A.**    No, he wasn't.

8     **Q.**    Your attorney wasn't present?

9     **A.**    No.

10    **Q.**    Were you given an opportunity to understand that you were  
11    under oath and everything you said was the truth and the whole  
12    truth?

13    **A.**    I don't remember if I was sworn in if that's what you're  
14    asking.

15    **Q.**    Do you remember raising your right hand similar to what  
16    you did right here?

17    **A.**    No, sir.

18    **Q.**    So is your testimony you were deposed before or weren't  
19    deposed before?

20    **A.**    I don't know.  I did my testimony over the phone with just  
21    me and a court reporter in a room with the officers.

22    **Q.**    And the court reporter was there taking down everything  
23    she wrote?

24    **A.**    Yes, sir.

25    **Q.**    Did you have an opportunity to review that transcript

## TRASK - CROSS / LEWIS

1 afterwards?

2 **A.** No, sir. I reviewed it in the last couple days but that's  
3 the only time.

4 **Q.** And so you are familiar with what you said at that time,  
5 then.

6 **A.** Yes, sir.

7 **Q.** All right. So I'm going to pull out an exhibit, if you  
8 would give me a minute here.

9 **MR. LEWIS:** Your Honor, I'm going to get Mr. Trask's  
10 sealed deposition transcript.

11 **MR. CUNNINGHAM:** It strikes me that this is beyond the  
12 scope of where I wanted to cut it off. I -- You know, he's  
13 cross-examining but --

14 **THE COURT:** Well, I think he's asking right now about  
15 the -- the method of searches, which is what I think you --

16 **MR. CUNNINGHAM:** That could be, but the particular  
17 searches --

18 **THE COURT:** Excuse me. Let me finish, counsel.

19 You inquired about some of the details during your direct  
20 examination so I think your objection will be overruled at this  
21 time.

22 **MR. LEWIS:** Your Honor, pardon my opening this.

23 (Pause in proceedings.)

24 **THE COURT:** Are you going to mark that, counsel?

25 **MR. LEWIS:** Your Honor, we could. It's . . . I



## TRASK - CROSS / LEWIS

1 could, but I'm going to try to read from it and maybe we'll  
2 mark it again. If Mr. Trask is going to be up here again, we  
3 can do it then as well.

4 **THE COURT:** Well, if you're going to use it as an  
5 exhibit and show it to the witness, I'll ask that it be marked.

6 **MR. LEWIS:** I was going to try to use the ELMO so he  
7 can see it.

8 **THE COURT:** Miss Clark, do we have those on the  
9 exhibit list?

10 **THE CLERK:** I don't have an exhibit list.

11 **MR. LEWIS:** The transcripts aren't in the exhibit  
12 list. They could be. I could have this marked next in line.

13 **THE COURT:** Why don't you?

14 **MR. LEWIS:** Ma'am, I think it would be B.

15 **THE CLERK:** B?

16 **MR. LEWIS:** B for "bravo."

17 (Defendants' Exhibit B marked for identification)

18 (Pause in proceedings.)

19 **THE COURT:** I assume at this time, you indicated you  
20 sealed it. Do you move to unseal the deposition.

21 **MR. LEWIS:** Yes, sir.

22 **THE COURT:** Any objection?

23 **MR. CUNNINGHAM:** I'm sorry. I didn't hear.

24 **THE COURT:** Counsel moved to unseal the exhibit. Any  
25 objection?

## TRASK - CROSS / LEWIS

1           **MR. CUNNINGHAM:** (Shaking head.)

2           **MR. LEWIS:** And pardon me, Your Honor, it's going to  
3 take a little while to warm this up.

4           **MR. CUNNINGHAM:** It doesn't seem necessarily right  
5 that he can put the text up on the screen before he identifies  
6 some passage that is relevant in cross-examination.

7           **THE COURT:** All right. Why don't we go ahead and just  
8 lay a foundation.

9           **MR. LEWIS:** Yes, Your Honor.

10          **MR. CUNNINGHAM:** And it also seems to me if he's going  
11 to quote from the deposition, that the -- it's one thing for it  
12 to be put up here, it's another thing for the witness to have a  
13 copy to read.

14          **THE COURT:** Perhaps you can give it to the witness to  
15 see what you're talking about.

16          **MR. LEWIS:** Yes, Your Honor.

17          May I approach, Your Honor?

18          **THE COURT:** Please.

19          **MR. QUINN:** For the record, I'm now showing Mr. Trask  
20 what was a sealed version of his deposition.

21          **MR. LEWIS:**

22          **Q.** Mr. Trask, do you see this cover? And could you read that  
23 for me, please.

24          **A.** Deposition of Kenneth Trask.

25          **Q.** Okay. And the date here is Friday, March 29th, 2013.

## TRASK - CROSS / LEWIS

1     **A.**    Yes, sir.

2     **Q.**    Having read this, do you recall maybe the conversation we  
3     mentioned where you were on the phone and Mr. Quinn was on the  
4     other side and there was a court reporter there?

5     **A.**    I don't know if it was Mr. Quinn was on the other side,  
6     but I remember my deposition being taken.

7     **Q.**    So you remember being deposed on this day.

8     **A.**    Yes.

9     **Q.**    All right. Now, I asked you about searches that were done  
10    by Mr. -- by Officer Abanico and you said that he searched you  
11    on November 18th, 2007, I believe it was?

12    **A.**    No. September 13th, 2007.

13    **Q.**    I'm sorry. September 13th, 2007. I apologize for that.  
14    I'm now going to show your deposition testimony.

15           **MR. CUNNINGHAM:** Again, you know . . .

16                               (Pause in proceedings.)

17           **MR. CUNNINGHAM:** Judge, he's exhibiting the transcript  
18    to the jury.

19           **THE COURT:** All right. Hold on everybody.

20           Is this for impeachment, counsel?

21           **MR. LEWIS:** It is, Your Honor.

22           **THE COURT:** All right. Then why don't you take -- Are  
23    you moving this into evidence at this time.

24           **MR. LEWIS:** We would move it into evidence, Your  
25    Honor.

## TRASK - CROSS / LEWIS

1           **THE COURT:** Any objection to this portion being moved  
2 into evidence?

3           **MR. CUNNINGHAM:** Which portion, Judge? I think that's  
4 the problem.

5           **THE COURT:** Well, do you have a copy of the  
6 transcript, counsel?

7           **MR. CUNNINGHAM:** No.

8           **THE COURT:** Well, why doesn't counsel have a copy of  
9 the transcript?

10          **MR. LEWIS:** Your Honor, Mr. Cunningham was given --  
11 was given a copy of his own client's deposition. It's not my  
12 responsibility to bring it to trial for him.

13          **MR. CUNNINGHAM:** No, I was not given a copy of it. I  
14 was --

15          **THE COURT:** All right. Hold on.

16          Ladies and gentlemen, we're going to take our afternoon  
17 break a little bit early this afternoon.

18          Please return at 2:35 promptly and we'll resume for the  
19 rest of the afternoon. Thank you.

20                 (The jury was excused from the courtroom.)

21                 (Open court, jury not present, at 2:21 PM:)

22          **THE COURT:** All right. Thank you.

23          Oh, hold on.

24                         (Pause in proceedings.)

25          **THE CLERK:** You may be seated.

## TRASK - CROSS / LEWIS

1           **THE COURT:** During the deposition, where were you,  
2 Mr. Cunningham?

3           **MR. CUNNINGHAM:** I was in the Attorney General's  
4 Office with Mr. Quinn and we were on the phone.

5           **THE COURT:** The two of you were on the phone. Your  
6 client -- Mr. Trask; is it?

7           **THE WITNESS:** Yes, sir.

8           **THE COURT:** Was at -- was at the institution and this  
9 was done with Mr. Trask and the reporter. The two counsel were  
10 together, just so the Court is clear.

11          **MR. LEWIS:** Yes, sir.

12          **THE COURT:** A transcript was prepared.

13          Now, was that transcript -- Do each side have a copy of  
14 this transcript?

15          **MR. CUNNINGHAM:** No.

16          **MR. LEWIS:** Your Honor . . .

17          **MR. CUNNINGHAM:** Judge, I do not have a copy. I  
18 didn't buy the transcript. I didn't spend the extra 300 bucks  
19 to get that one. And I have a few pages of it that were  
20 included in the exhibit.

21          I would -- I'm prepared to deal with that reality, Judge,  
22 in a trial, but I've never seen a transcript text put up on the  
23 screen for the jury to read as opposed to a witness being asked  
24 if he was asked the questions and gave the answers from the  
25 transcript when he can see the transcript in front of him. I

**TRASK - CROSS / LEWIS**

1 don't think that we needed a copy for that to be accomplished.

2 **MR. LEWIS:** Your Honor, it's -- This is the easiest  
3 way to get the information out for all parties concerned.  
4 It's -- We're using the courtroom technology that we notified  
5 the Court we'd be using and allowed to use it. We've tested  
6 the system. We have it up. This is direct impeachment  
7 evidence about the statement he read.

8 I know Mr. Cunningham didn't want his witness to go this  
9 far but he opened the door.

10 **THE COURT:** Here's what we're doing:  
11 Objection's overruled. Counsel can put up the transcript  
12 onto the -- to the overhead and you can ask the witness  
13 questions regarding it.

14 But what Mr. Cunningham indicated to me was that he was  
15 going to basically use Mr. Trask for general overlay. I did  
16 interrupt him at one point during his direct testimony and say,  
17 "Look, you seem to be going a little further." Mr. Cunningham  
18 indicated he was going to stop.

19 My understanding is that Mr. Cunningham is going to then  
20 redirect when it comes to the individual claims against  
21 Correctional Officer Abanico. And so to the extent that you  
22 move into those individual claims, what I'd ask is we go ahead,  
23 let Mr. Cunningham bring him on back to the stand to testify on  
24 direct. You can impeach him then with this information.

25 As to what he talked about, some general activities or

## TRASK - CROSS / LEWIS

1 the -- his understanding of how daily prison life runs and how  
2 people are searched, you obviously can impeach him on that at  
3 this time.

4 Now, I'm going to say this: If for some reason  
5 Mr. Cunningham does not put Mr. Trask back on, you can recall  
6 him and continue with your impeachment to the extent that he's  
7 already testified.

8 **MR. LEWIS:** Thank you, Your Honor. That was my  
9 primary concern.

10 And I don't mean to take away anything from  
11 Mr. Cunningham's testimony (sic).

12 **THE COURT:** I --

13 **MR. LEWIS:** I appreciate that, Your Honor. That's  
14 exactly what my concern was.

15 **THE COURT:** So one way or another, you'll obviously be  
16 able to impeach him to the extent you think it's appropriate.

17 But at this juncture, why don't we just focus on the  
18 general information that was elicited from this witness. If  
19 you wish to impeach him, go ahead and then obviously reserve  
20 your right to then go -- go into detail as to his own personal  
21 claims against Abanico.

22 **MR. LEWIS:** Yes, Your Honor. We can wrap this one up  
23 real quick with the jury.

24 **THE COURT:** Good.

25 **MR. CUNNINGHAM:** Thank you, Judge.

## PROCEEDINGS

1           **THE COURT:** We'll start back up at 2:35.

2           **MR. LEWIS:** Yes, Your Honor. Thank you.

3                       (Recess taken at 2:26 p.m.)

4                       (Proceedings resumed at 2:42 p.m.)

5           (Proceedings were heard out of the presence of the jury:)

6           **THE COURT:** Counsel, I would just briefly direct the  
7 attorneys' attention to Federal Rules of Evidence 613:  
8 (reading)

9           "Witness' Prior Statement.

10           "(a) Showing or Disclosing the Statement During  
11 Examination. When examining a witness about the witness'  
12 prior statement, a party need not show it or disclose its  
13 contents to the witness. But the party must, on request,  
14 show it or disclose its contents to an adverse party's  
15 attorney."

16           So I believe showing it on the overhead is up to counsel's  
17 discretion in this matter, and I'll allow you to put it on the  
18 overhead; however, prior to doing that, you'll need to show the  
19 relevant portion to plaintiffs' counsel.

20           **MR. LEWIS:** Very well, Your Honor. Thank you.

21           **MR. CUNNINGHAM:** Judge, doesn't Rule 608 preclude the  
22 publication of the text, impeachment text, certainly the entry  
23 into evidence?

24           **MR. LEWIS:** And, Your Honor, not only is it  
25 impeachment evidence, it's also a statement by a party



## TRASK - CROSS / LEWIS

1 opponent. So, therefore, it can be used for any purpose  
2 allowed under FRE. So it's not exactly controlled by the 600  
3 series.

4 **THE COURT:** This is neither reputation nor opinion  
5 evidence nor is it specific instances of conduct. So that  
6 motion will be overruled.

7 All right.

8 **MR. LEWIS:** Yes, Your Honor. Thank you.

9 **THE COURT:** Lisa, bring them back in.

10 (Proceedings were heard in the presence of the jury:)

11 **THE CLERK:** Please be seated.

12 Okay. We're back on the record in Civil 07-2809, Ivan  
13 Cleveland versus Ben Curry.

14 **THE COURT:** Thank you.

15 (Pause in proceedings.)

16 **THE COURT:** Just so that the jury understands,  
17 Mr. Cunningham asked to bifurcate or split the testimony of  
18 this witness into a general area, and then afterwards he'll  
19 come back on to testify to any personal experiences he's had.

20 I've asked defense counsel to also sort of limit his  
21 cross-examination to follow that particular way of presenting  
22 this evidence.

23 So it will be a little bit disjointed, so I ask you to  
24 bear with us. Thank you so much.

25 **MR. LEWIS:** Thank you, Your Honor.

## TRASK - CROSS / LEWIS

1 Q. Mr. Trask, you had commented that you believed that when I  
2 asked you how many searches Officer Abanico had conducted, you  
3 said approximately 20 searches between 2006 and 2008; correct?

4 A. Yes, sir.

5 Q. Do you remember the date of any of those specific  
6 searches?

7 A. The only date that I remember is the date that I  
8 mentioned.

9 Q. And was that date 9/13/2008?

10 A. 9/13/2007. It was the day I went to the hole.

11 Q. All right. And do you recall that you had been deposed in  
12 the case and there was a transcript made of that?

13 A. Yes, sir.

14 Q. I'm now going to show you part of that transcript from  
15 your deposition. I've shown this to opposing counsel.

16 Specifically I'm calling your attention to page 10.

17 Can you see that or do you want me to zoom in a little  
18 closer?

19 A. I have a copy of it.

20 Q. All right. So I'd like you to look at page 10.

21 THE COURT: Of defendants'?

22 MR. LEWIS: Of Defendants' Exhibit Bravo, Your Honor,  
23 yes, B.

24 THE COURT: Okay.

25

## TRASK - CROSS / LEWIS

1 **BY MR. LEWIS:**

2 **Q.** And I'd like you to look at page 14 -- oh, I'm sorry, line  
3 14: (reading)

4 **"Q.** And you don't remember -- do you remember any  
5 particular date -- the specific dates when those searches  
6 occurred?

7 **"A.** No. Only date I remember is -- will be September 13,  
8 2008, when I was accused of threatening his life and was  
9 put in the hole."

10 You testified that Officer Abanico conducted a search on  
11 you on September 13th, 2008 or 2007; correct?

12 **A.** Yes, sir.

13 **MR. CUNNINGHAM:** Well, objection. That misstates the  
14 testimony.

15 **THE COURT:** That's correct. I believe, Counsel, the  
16 testimony was that this witness said 2007 and you've been  
17 indicating that it was 2008.

18 **MR. LEWIS:** My apologies.

19 **Q.** You believe he conducted the search in September 13th,  
20 2007?

21 **A.** Yes. I have documents here where I was locked up.

22 **Q.** Was that the date that he allegedly threatened your life  
23 and you were put in the hole afterwards?

24 **A.** No. That was the date he said I threatened his life.

25 **Q.** Oh, I'm sorry. That you alleged that he threatened your

## TRASK - CROSS / LEWIS

1 life -- or his life -- that you threatened his life and then he  
2 put you in the hole or he caused you to be put in the hole?

3 **A.** Yes, sir.

4 **Q.** In your deposition testimony it says here on page 10, it  
5 says 2008. Could that have been a mistake that you made --

6 **A.** Yes, sir.

7 **Q.** -- on that day?

8 So do you believe that really this testimony right here  
9 where it says 2008 really was supposed to be 2007?

10 **A.** Yes, sir.

11 **THE COURT:** Can the jury see that? Okay.

12 **MR. LEWIS:** Am I in your way? I apologize.

13 **A JUROR:** Yes.

14 **MR. LEWIS:** I am in your way? Okay. I'll try to work  
15 the best I can around this. That's not going to work.

16 **Q.** All right. So if you can see that this right here 2008  
17 should be 2007 in your mind; correct?

18 **A.** Yes, according to when I went to the hole. 2008 was not  
19 the date. It was 2007 --

20 **Q.** 2007.

21 **A.** -- September 13th, 2007.

22 **Q.** All right. But you testified that on that date in your  
23 mind, September 13th, 2007, Defendant Abanico was actually the  
24 one who conducted the clothed body search of you after that  
25 incident; correct?

## TRASK - CROSS / LEWIS

1   **A.**   There was two searches done that day.  There was --

2   **Q.**   Well, I'd like to -- let me go here (indicating).

3       I'm calling your attention now to page --

4               **THE COURT:**  Wait.  Allow the witness to answer the  
5 question.

6               **MR. CUNNINGHAM:**  I think he's going pretty far into  
7 it, Judge.

8               **THE COURT:**  Go ahead.

9               **THE WITNESS:**  There was two searches done that day.  
10 One search was done when I was accused of threatening his life,  
11 clothing body search was done by Officer Abanico; and I was  
12 taken to what they call the cage, and I was strip-searched and  
13 searched again.

14   **BY MR. LEWIS:**

15   **Q.**   And you think that -- and it's your testimony that  
16 Officer Abanico conducted that clothed body search; correct?

17   **A.**   Yes, sir.

18   **Q.**   I'd now like to call your attention to page 15 of the same  
19 transcript, specifically line 11.  It says:  (reading)

20       **"Q.**  Did Abanico conduct either of those searches you  
21 mentioned that you were searched up against the wall?  Did  
22 Abanico conduct either one of those searches?

23       **"A.**  Abanico was present.  And I'm not -- I don't -- he  
24 didn't do the searching.  He was present while another  
25 officer in the corridor did the initial search, the

## TRASK - CROSS / LEWIS

1 clothing body search."

2 **A.** Did I --

3 **Q.** Is that your testimony?

4 **A.** Again, sir, that, "I'm not -- I don't," was I didn't  
5 remember exactly who -- if he was present or he personally did  
6 the search. So -- but, yes, he was there and he could have  
7 done the search. That's why I said, "I'm not," because I  
8 wasn't sure or not if he was the one that conducted the search;  
9 but I know two body searches was conducted on me that day.

10 **Q.** But you say here: (reading)

11 "He was present while another officer in the corridor  
12 did the initial search, the clothed body search."

13 So he didn't actually conduct the search on you on  
14 November 13th -- I'm sorry, on September 13th, 2007, did he?

15 **A.** Again, sir, I can't be for sure if it was him or another  
16 officer that conducted the search. It was really chaotic that  
17 night because I was accused of threatening his life. So I  
18 really can't remember.

19 **MR. LEWIS:** No further questions, Your Honor.

20 **THE COURT:** All right. Thank you.

21 Brief redirect?

22 **MR. CUNNINGHAM:** Thank you, Judge.

23 **THE COURT:** Remember, we're just talking now in  
24 general terms. You're going to have another opportunity as you  
25 indicated.

## TRASK - REDIRECT / CUNNINGHAM

1           **MR. CUNNINGHAM:** Yes. Yes. And for the most part, I  
2 will leave that, but I need to ask.

3                           **REDIRECT EXAMINATION**

4           **BY MR. CUNNINGHAM:**

5           **Q.** You are as certain today that the date of that -- of  
6 the -- when you went to the hole, whether he searched you or  
7 not or was just present was in '07, not '08; right?

8           **A.** I'm positive.

9           **Q.** How do you know that?

10          **A.** I have the paperwork where -- the 114 Lockup Order that  
11 shows that I was locked up in the hole September 13th, 2007.

12          **Q.** Okay. And was it '08 when you got out of the hole?

13          **A.** Yes, sir.

14          **Q.** How long were you in the hole?

15          **A.** For eight months.

16          **Q.** Then what happened?

17          **A.** I was transferred to another prison.

18          **Q.** Was there ever a hearing held on the charge?

19                   **THE COURT:** This is going beyond --

20                   **MR. CUNNINGHAM:** All right. We'll leave that then.

21 Thank you.

22                   **THE COURT:** -- the scope of cross-examination.

23                   **MR. CUNNINGHAM:** Okay.

24                   **THE COURT:** That's with leave to go into that if it's  
25 relevant when you recall him on direct.

## TRASK - REDIRECT / CUNNINGHAM

1           **MR. CUNNINGHAM:** Thank you.

2   **Q.** All right. Counsel said, well, it turns out there's all  
3 these different ways of searching; with the hand, without the  
4 hand, with one hand, with two hands. What are the ways that  
5 you've been searched?

6   **A.** The three ways that I mentioned. I said it was just two  
7 different ways, but either with the hand to the back or the  
8 elbow to the back.

9   **Q.** Let me put it this way: Leave out the -- the third way  
10 being the way Abanico searched you; right?

11   **A.** Yes, sir.

12   **Q.** Leave that out of it. Just talk about how everybody else  
13 searched you.

14   **A.** Then I would say that would be a whole different way. It  
15 would be one other way.

16   **Q.** What would that be?

17   **A.** And that would be starting from the top, working to the  
18 bottom.

19   **Q.** But what about the two-hands/one-hand thing?

20   **A.** Sometimes officers use one hand, and sometimes they use  
21 two hands, but I wouldn't say it was two different methods. If  
22 we talk about methods, that would be like saying one officer  
23 started at the legs and worked his way up or he started at the  
24 waist and worked his way up.

25           When I say one way, I mean some officers used elbow in the



## TRASK - REDIRECT / CUNNINGHAM

1 back, some officers used their hand in the back, and that's the  
2 only way that I knew.

3 Q. And then is the search always from the top down?

4 A. Yes, sir.

5 Q. And it goes down a leg and up a leg if it's one hand?

6 A. Yes, sir. Well, what they would do, they would work their  
7 way down one side of the body, then they'd work their way down  
8 the other side of the body.

9 Q. Okay. So if he searches you with only one hand and the  
10 other hand or arm is in the back --

11 A. Yes, sir.

12 Q. -- he always goes from the top down both the inside and  
13 the outside of the leg?

14 A. Yes, he does.

15 Q. Okay.

16 A. He works his way down with one hand, again on one side of  
17 the body. Then work his way down on the other side of the  
18 body.

19 Q. Okay. So in your experience he doesn't work his way up  
20 the leg into the groin?

21 A. No.

22 Q. When he starts at the top of the leg, does he -- top of  
23 the inside of the leg, does it come in contact with your groin?

24 A. When you're talking about "he," who are we talking about?

25 Q. Any officer. A regular officer. A normal officer.

## TRASK - REDIRECT / CUNNINGHAM

1    **A.**    Briefly sweeping and moving on.  No lingering in that  
2    particular area.

3    **Q.**    But do you normally get some physical contact that you  
4    could feel that would represent detection of anything that  
5    might be sewn into the underpants, for example?

6    **A.**    No.  I never had an officer squeeze my penis or my  
7    scrotum.

8    **Q.**    Okay.  But what about an officer whose hand would come  
9    right up to the top of your leg?

10   **A.**    It would be -- it would be a brief sweep to see if there  
11   was any contraband and move on.

12   **Q.**    And that's what I'm talking about.  What you're calling a  
13   brief sweep, when it was done in a normal fashion, would -- in  
14   your mind, was it sufficient to detect whether there was  
15   anything in your underpants?

16           **MR. LEWIS:**  Objection, Your Honor.  It calls for  
17   speculation, Your Honor.  He's not conducting the search on  
18   himself.  He's not a correction officer, and he's not licensed  
19   or POST certified to give this testimony.

20           **THE COURT:**  Well, he can testify as to what happened  
21   to him and what he felt.

22   **BY MR. CUNNINGHAM:**

23   **Q.**    Sir, did you ever -- well, never mind.

24           I'm asking that question.  In your mind when -- the sweep  
25   of the crotch area, okay, including both the genitals and the

## TRASK - REDIRECT / CUNNINGHAM

1 groin, the space between the legs behind the genitals --

2 A. Right.

3 Q. -- would they normally put their hand through there in  
4 such a way as, in your mind, if there was something hidden in  
5 there, they would get it, they would detect it?

6 A. Let me try and explain where everybody can understand.  
7 I've never had an officer search me that way and use his  
8 fingers, right, in that area. I've had an officer who swept  
9 that area using his palms --

10 Q. Okay.

11 A. -- you know, to see if any contraband was there. I've  
12 never had an officer that lingered in that area, you know,  
13 caressing my private parts with his fingers.

14 Q. Okay. Have you ever had an officer grab your private  
15 parts and squeeze it?

16 A. No, sir, other than Officer Abanico.

17 Q. Either the penis or the scrotum, testicles?

18 A. No, sir, other than Abanico.

19 Q. All right.

20 THE COURT: You know, Counsel, maybe I misunderstood  
21 what's going on. My understanding was that you just wanted to  
22 talk to this witness at this juncture about the general conduct  
23 of guards and basically daily prison life, and then you were  
24 going to call him back with the other ones. It seems like  
25 you're sort of continuing about the questions, personal

## TRASK - REDIRECT / CUNNINGHAM

1 questions.

2           **MR. CUNNINGHAM:** I meant that as the general, Judge,  
3 that what is the technique that he's used to from other  
4 officers; and, you know, it does trench on the other subject  
5 matter. I'm not going to go any further with it at this point.

6           **THE COURT:** All right. Any further questions?

7           **MR. CUNNINGHAM:** Wait just a moment, Judge.

8                               (Pause in proceedings.)

9           **MR. CUNNINGHAM:** No further questions. Thank you,  
10 Mr. Trask.

11           **THE COURT:** All right. With the understanding that  
12 you get to cross-examine later on.

13           **MR. LEWIS:** Yes, Your Honor. We'll reserve our right  
14 to cross-examine at a later date.

15           **THE COURT:** All right. Thank you.

16           **MR. LEWIS:** Thank you, Your Honor.

17                               (Witness excused subject to recall.)

18           **THE COURT:** Your next witness, Counsel?

19           **MR. CUNNINGHAM:** Our next witness is Ivan Cleveland,  
20 Judge.

21           **THE COURT:** All right.

22           **THE CLERK:** Mr. Cleveland, if you'll please come take  
23 the witness stand. Will you stand and raise your right hand?

24           **THE WITNESS:** Yes, ma'am.

25

## CLEVELAND - DIRECT / CUNNINGHAM

IVAN VERNORD CLEVELAND,

called as a witness for the Plaintiffs, having been duly sworn,  
testified as follows:

**THE WITNESS:** Yes, ma'am.

**THE CLERK:** Please be seated.

**THE COURT:** Good afternoon, Mr. Cleveland.

**THE WITNESS:** How you doing, sir?

**THE CLERK:** Please state your full name for the Court  
and spell your last name.

**THE WITNESS:** Ivan Vernord Cleveland,  
C-L-E-V-E-L-A-N-D.

**THE CLERK:** Thank you.

DIRECT EXAMINATION

**BY MR. CUNNINGHAM:**

**Q.** Mr. Cleveland, are you a prisoner in the CDCR?

**A.** Yes, sir.

**Q.** And where are you housed these days?

**A.** B Wing 127, CTF Central.

**Q.** And CTF Central, that's Soledad; right?

**A.** That's correct.

**Q.** And what is Central the CTF as opposed to anything --

**A.** California Training Facility.

**Q.** Wait for my question. Okay?

**A.** Okay.

**Q.** What's the Central part? What does that refer to?

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1 A. I don't have any idea about that.

2 Q. Are there other parts, like --

3 A. Yes.

4 Q. -- South, West, East?

5 A. (Nods head.)

6 Q. But this is Central, this is one self-contained unit; is  
7 that fair?

8 A. Yes, sir.

9 Q. As Mr. Trask described it with that long corridor and the  
10 different wings and the other places coming off the corridor?

11 A. Yes, sir.

12 Q. That's where you were living in 206 -- 2006 and 2007?

13 A. Yes, sir.

14 Q. And, all right, are you living in a different wing now  
15 than you were then?

16 A. Yes, sir.

17 Q. What wing were you living in then?

18 A. B Wing 127.

19 Q. Okay. And at that time were you familiar with the  
20 defendant, Officer Abanico?

21 A. Yes, sir.

22 Q. And was he assigned to the wing you were living in?

23 A. No. Not to my knowledge he wasn't.

24 Q. Okay.

25 A. He wasn't assigned to F Wing.

1 Q. You weren't assigned there?

2 A. I was in F Wing at the time, 2006.

3 Q. Oh, I'm sorry. I thought you said --

4 A. I'm in B Wing now.

5 Q. B Wing now, okay.

6 And he was not an officer, a wing officer, at that time?

7 A. No.

8 Q. Okay. Where did you first encounter Officer Abanico?

9 A. Personally with my own experience?

10 Q. Yes.

11 A. 2006.

12 Q. Okay.

13 A. In the hallway.

14 Q. Okay.

15 A. Corridor.

16 Q. In the corridor?

17 A. Yes.

18 Q. And what were the circumstances? What happened?

19 THE COURT: Let me just be clear. I'm sorry.

20 Mr. Cleveland, when you say "the corridor," you're  
21 referring to that long corridor that Mr. Trask testified he  
22 said was about a quarter mile long and that the different wings  
23 spilled out into that corridor; is that correct?

24 THE WITNESS: Yes, sir.

25 THE COURT: All right. Thank you.

1 **BY MR. CUNNINGHAM:**

2 **Q.** Okay. And you encountered him where? He wasn't working  
3 in the unit you were living?

4 **A.** No, sir.

5 **Q.** So you encountered him in the corridor?

6 **A.** Yes, sir.

7 **Q.** And how did that come about?

8 **A.** On my way to chow I was pulled over, stopped by  
9 Officer Abanico, and told to get against the wall.

10 **Q.** Uh-huh. And had you heard anything about him before that  
11 occasion?

12 **A.** Yes, sir.

13 **Q.** Okay. Well, what kind of stuff had you heard?

14 **A.** I had heard that --

15 **MR. QUINN:** Objection. Hearsay.

16 **THE COURT:** Sustained.

17 **BY MR. CUNNINGHAM:**

18 **Q.** Had you heard other prisoners talk about him as somebody  
19 who did unusual searches or wrongful searches?

20 **MR. QUINN:** Objection. Hearsay.

21 **THE COURT:** Sustained, Counsel.

22 **MR. CUNNINGHAM:** Okay.

23 **THE COURT:** You have to have a basis for the hearsay  
24 testimony.

25 **MR. CUNNINGHAM:** All right. I mean, I'm asking for



1 the witness' state of mind, Judge, as opposed to whether the  
2 things he was told were true.

3 **THE COURT:** There's a way to phrase that, Counsel.

4 **MR. CUNNINGHAM:** Very well.

5 **Q.** When you -- strike it.

6 You had heard about him, correct, when he pulled you over  
7 the first time?

8 **A.** Yes, sir.

9 **Q.** And had you had any other interaction with him in any  
10 other circumstances before that day?

11 **A.** No, sir.

12 **Q.** And when he pulled you over on that day, what happened?

13 **A.** I was told to put my hands up against the wall. I  
14 complied. I was told to bring my legs back. I complied. Come  
15 back further. I complied.

16 **Q.** What was, I'm sorry, the last thing?

17 **A.** Put my legs back further.

18 **Q.** Further.

19 **A.** Yes.

20 **Q.** Uh-huh.

21 **A.** Where my body position would be where my buttocks was  
22 sticking out further.

23 **Q.** Okay.

24 **A.** I complied.

25 Officer Abanico went into pulling my waistband to my pants

1 back to my buttocks, looked inside to see my buttocks, snapped  
2 them back. Put his elbow on my back. Went to the inner  
3 thighs, both inner thighs, grabbed the penis, squeezed; and  
4 grabbed the genitalia, the testicles, and squeezed.

5 At that time I came off of the wall, and I squared off on  
6 him really. And I said, "Man, you're not supposed to be  
7 touching me like that."

8 He says, "Sir, sir, get back against the wall."

9 I said, "Listen, man, you're not supposed to be touching  
10 me like that." I said, "That's an inappropriate way of  
11 touching me." I said, "I'm not letting you touch me like  
12 that."

13 **Q.** Okay. Was there another officer present when this was  
14 happening after you came off the wall?

15 **A.** At that -- I'm not for sure. If it was, he wasn't within  
16 the area right there. He was about 5 or 6 feet away facing the  
17 inmates walking back and forth, but I'm not for sure how close  
18 he was; but there's usually always officers present but, you  
19 know, at that time, you know, but I'm not for sure the distance  
20 of the officer.

21 **Q.** Okay. All right. And then you said, "You're not supposed  
22 to be touching me that way."

23 **A.** Yes.

24 **Q.** What did he say?

25 **A.** He said, "Sir, get back against the wall. Sir, get back

1 against the wall." He always says "sir."

2 Q. And then what happened?

3 A. I got back against the wall after asking him not --  
4 telling him -- not asking, telling him he shouldn't be touching  
5 me that way. He put his elbow back on my back, proceeded with  
6 the search, squeezed again, and then let me go.

7 Q. And did you say anything more to him then?

8 A. At that moment I can't remember if I did or not. It was  
9 2006 and, you know, I know I went to a sergeant.

10 Q. Right then?

11 A. Yes. I left him and went directly to a sergeant.

12 Q. Okay. Who was that sergeant?

13 A. If I'm not mistaken, it was Sergeant Randall.

14 Q. And what did you tell Sergeant Randall?

15 A. I complained about what had just happened to me.

16 MR. QUINN: Objection. Hearsay.

17 THE COURT: Overruled. It's what he testified to.

18 THE WITNESS: Yeah, I complained about what had just  
19 happened to me to Sergeant Randall; and I told him to the  
20 extent of it, and told him that I had been touched in this  
21 manner, that I'd been groped and fondled by the CO.

22 BY MR. CUNNINGHAM:

23 Q. And did he respond?

24 A. Yes, he did, sir.

25 Q. What did he tell you?

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1           **MR. QUINN:** Objection. Hearsay.

2           **MR. CUNNINGHAM:** Again, it's this witness' state of  
3 mind what he was told, not whether the officer -- you know,  
4 we're not trying to prove anything true or false from somebody.

5           **THE COURT:** There's a way of asking these questions,  
6 Counsel. As posed, the objection is sustained. Move on.

7           **MR. CUNNINGHAM:** All right.

8   **Q.** Did Sergeant Randall tell you he would do anything about  
9 it?

10          **MR. QUINN:** Objection. Hearsay.

11          **THE COURT:** Sustained.

12          **MR. CUNNINGHAM:** I'm not following you, Judge. All  
13 right.

14          **THE COURT:** You're eliciting from this witness the  
15 statements of another person. That is hearsay, Counsel.

16          **MR. CUNNINGHAM:** Well, Judge, I'm not trying to prove  
17 those statements are true.

18          **THE COURT:** Proceed.

19          **MR. CUNNINGHAM:** All right.

20   **Q.** After your meeting with Sergeant Randall, did you do  
21 anything else to follow up on this complaint -- on your  
22 complaint about Abanico's search?

23   **A.** Yes, sir.

24   **Q.** What did you do?

25   **A.** First I put together a grievance, a class action

1 grievance, because, like I had said before, I had already been  
2 told about the incidents with other inmates. So I put together  
3 a grievance on my own. I went out to the Administrative Yard,  
4 and I asked anyone that had ever been searched inappropriately  
5 or fondled by this officer to sign this grievance; and I  
6 stipulated that, "If you have not, do not sign this grievance."

7 **Q.** All right. And showing you -- if I could approach,  
8 Judge -- what's been previously marked as Plaintiffs' Exhibit  
9 Number 1?

10 **THE COURT:** Mr. Quinn, do you have a copy of the  
11 exhibits?

12 **MR. QUINN:** I believe so.

13 **THE COURT:** All right. We're marking at this time,  
14 previously marked already is Plaintiffs' 1.

15 (Plaintiffs' Exhibit 1 marked for identification)

16 (Pause in proceedings.)

17 **MR. QUINN:** Your Honor, before we go down the road of  
18 questioning, we request a sidebar, just a brief sidebar, to  
19 address Exhibit 1.

20 **THE COURT:** All right.

21 (Sidebar conference heard but not reported.)

22 **THE COURT:** Madam Reporter, we'll put that sidebar on  
23 the record at the end of today's testimony.

24 **BY MR. CUNNINGHAM:**

25 **Q.** So the document there, does it have a number on it, a

1 serial number or some stamped number toward the top there?

2 **A.** Case number for this or a log number?

3 **Q.** Case. I think it's case.

4 **A.** You have a case number. You have a log number. The case  
5 number is for the case and the log number is for the appeal.  
6 Here's the appeal number right here (indicating).

7 **Q.** This is right here (indicating).

8 **A.** That's the log number.

9 **Q.** Okay. The log number?

10 **A.** Yes, it does, sir.

11 **Q.** And you were -- you assembled the whole document; correct?

12 **A.** Yes, sir.

13 **Q.** You wrote the body of the first several pages before the  
14 signatures; is that it?

15 **A.** Yes, sir.

16 **Q.** And you had the interaction with the other prisoners that  
17 you described in the preparation of the document; right?

18 **A.** 127 of them.

19 **Q.** Okay. And then what did you do with --

20 **MR. QUINN:** Objection, Your Honor. That's the subject  
21 of the sidebar.

22 **THE COURT:** All right. Counsel, limit your inquiry  
23 just as to what he did, not the parties that he interviewed.

24 **MR. CUNNINGHAM:** Right.

25 **Q.** What did you do with the document once it was completed?

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1     **A.**    I submitted it to the appeals coordinator.

2     **Q.**    Okay.  And....

3                                 (Pause in proceedings.)

4     **BY MR. CUNNINGHAM:**

5     **Q.**    What's the first response that you got from -- strike it.  
6     I'm sorry.

7               Who did you submit it to, if you recall?

8     **A.**    I submitted it to the coordinator; but if I'm not  
9     mistaken, it ended up in Sergeant Randall's hands somehow, one  
10    of the sergeant's hands.

11    **Q.**    I'm sorry.  You said you submitted --

12    **A.**    I submitted it.  By the appeals process we submit it to  
13    the appeals coordinator.

14    **Q.**    I see.  Okay.

15    **A.**    And they give it to -- designate it to either a sergeant  
16    or a lieutenant to handle the process.

17    **Q.**    All right.  And then did you get interviewed by  
18    Sergeant Randall about it?

19    **A.**    Yes, sir, I did.

20    **Q.**    Okay.  And did he prepare any written report about it to  
21    your knowledge?

22    **A.**    At this time, no, not to my knowledge.

23    **Q.**    Let me give you this exhibit as well.  It's marked 6A1 for  
24    identification, Plaintiffs' 6A1.

25    **A.**    (Witness examines document.)

1 Q. After you spoke to him about it, spoke to Randall about  
2 it, what happened next with respect to this grievance?

3 A. It was partially granted.

4 Q. And who partially granted it, if you know?

5 A. All I can see here is the signature of a staff which I  
6 can't understand. There's another sergeant and I think it says  
7 Keane or something.

8 Q. And are you getting that from the pages that are in the  
9 exhibit I just showed you?

10 A. Yes, sir.

11 Q. Okay. And after the first -- the first set of pages in  
12 the exhibit is the same petition that's Exhibit 1; is that  
13 correct?

14 A. Yes, sir.

15 Q. And after that, is that, that next page, is that a page  
16 that was given back -- I'm sorry. Not that page. Strike it.

17 Did you do anything else before you heard back from  
18 administration about the appeal in order to pursue the  
19 grievance against Officer Abanico?

20 A. I don't understand.

21 Q. Did you complain to somebody besides the 602?

22 A. Oh, yes, without a doubt.

23 Q. What did you do?

24 A. I complained to Captain Guerrero. I complained to a  
25 couple other COs.



1 Q. And did you write the Internal Affairs?

2 A. I wrote to Internal Affairs twice on this matter.

3 Q. Uh-huh. And what happened with your letter to  
4 Internal Affairs?

5 A. I got a response back from Special Agent Brad Williams  
6 stating about the staff misconduct, and informed that I  
7 guess --

8 MR. QUINN: Objection. Hearsay.

9 THE WITNESS: Well, I have it right here.

10 BY MR. CUNNINGHAM:

11 Q. Did he take action on the complaint or did he return the  
12 complaint to the institution?

13 A. He returned the complaint to the institution.

14 Q. Okay. Were you ever contacted -- strike.  
15 You said you wrote to them twice?

16 A. Yes. I wrote to Internal Affairs twice and got two  
17 different special agents from the Internal Affairs.

18 Q. Uh-huh. And did they both return the complaint to the  
19 institution?

20 A. Yes. With giving me a personal letter saying that they  
21 were my agents.

22 Q. That they?

23 A. Were my special agents investigating that was supposed to  
24 take over the situation.

25 Q. But they -- instead of making an investigation, they

1 returned the complaint to the institution; is that what you're  
2 saying?

3 A. Yes, sir.

4 Q. Okay. Did you hear within the institution any response to  
5 the letters to Internal Affairs?

6 A. No, sir.

7 Q. All right. When -- strike it.

8 Did you do anything else?

9 A. Yes, sir.

10 Q. What else did you do about this?

11 A. I wrote a letter to the Inspector General. I wrote a  
12 letter to the Warden. I wrote a letter to the Associate  
13 Warden. I was so upset about the situation, any number --  
14 there was even a number that came on the television about a  
15 cooking commercial that had a telephone number on it, and I  
16 sent them a copy just to get anybody to listen, you know. I  
17 sent -- Jay Leno had his address on TV, I sent him letters. I  
18 sent out over -- anywhere over between 15 and 20 letters to  
19 different people that I just wanted to listen, different  
20 lawyers, everybody, anybody that would hear what I was saying.

21 Q. And did you send something to the court in Monterey  
22 County?

23 A. Yes, I did, sir.

24 Q. And what was that?

25 A. That was a Complaint stating that something had to be done

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1 about the abuse to the Monterey County Court Superior.

2 Q. And what all did you -- what all did you include in the  
3 papers you sent to the court?

4 A. I included signatures from 127 inmates.

5 MR. QUINN: Objection, Your Honor. Hearsay.

6 THE COURT: Well, the signatures --

7 MR. QUINN: And we've been over this previously.

8 MR. CUNNINGHAM: I don't think this is what we were  
9 talking about at all. I mean, the actions --

10 THE COURT: All right. Just a minute. I think I've  
11 already ruled on this; and to the extent that it goes into the  
12 signatures, the hearsay objection will be sustained.

13 MR. CUNNINGHAM: All right. But --

14 THE COURT: The hearsay objection is sustained.

15 MR. CUNNINGHAM: I understand.

16 Q. My question is, then: Did you send a copy of the petition  
17 that you had prepared that is Case Number 3011 -- 06-3011 to  
18 the court?

19 A. Yes, sir.

20 Q. And did you send -- showing you what's been marked  
21 Plaintiffs' 2, do you recognize those documents?

22 A. Yes, sir.

23 Q. And were those also sent to the court?

24 A. Yes, sir.

25 Q. And had you prepared those documents in any way?

1 A. What do you mean?

2 Q. Did you have some part in the preparation of those  
3 documents in Exhibit 2?

4 A. Yes, sir.

5 Q. And what did you do there? What did you do?

6 A. What I did was went to the library, typed -- wrote in a  
7 paper-made personal affidavit.

8 Q. And, so, then you -- did you leave part of it blank?

9 A. Yes, sir.

10 Q. Okay. And was the blank part then filled in by others?

11 A. Yes, sir.

12 Q. And that document was also sent to the court --

13 A. Yes, sir.

14 Q. -- those documents?

15 And did you receive a ruling from the court?

16 A. On the first -- the first one I received was a show cause  
17 for informal level, informal response to the institution.

18 Q. A paper came back from the court?

19 A. Stating show cause on the Complaint, and that the  
20 institution had to respond to it on an informal level.

21 Q. And did they do that to your knowledge?

22 A. Yes, sir.

23 Q. And did you get a copy of their informal response?

24 A. Yes, sir.

25 Q. And did the informal response acknowledge the grievance?

1     **A.**    Yes, sir.

2     **Q.**    And did they explain -- what explanation did they give to  
3     the court by way of informal response?

4     **A.**    The institution?

5     **Q.**    Yes.

6     **A.**    They stated that they did their own investigation and that  
7     they didn't see that anything -- any rights were violated.

8     **Q.**    Did they -- was that in the form of a letter to the court?

9     **A.**    Yes, sir.

10    **Q.**    Okay. And did it come from the institution or some other  
11    place?

12    **A.**    It came from the institution, if I'm not mistaken. I'm  
13    not for sure.

14    **Q.**    Okay. And, so, then did the court take any action?

15    **A.**    After they received that, the court denied my claim.

16    **Q.**    All right.

17           **THE COURT:** Let me ask counsel. This Monterey County  
18    action, the State action, this was not removed to  
19    Federal Court; was it? This isn't the basis for this action?

20           **MR. CUNNINGHAM:** No.

21           **THE COURT:** All right.

22           **MR. CUNNINGHAM:** No.

23    **Q.**    Did you get any further response within the institution or  
24    through channels in the Department about the grievance?

25    **A.**    I don't understand the question.

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1 Q. What response, if any, did you get -- I'm sorry. Let me  
2 go back.

3 Nothing happened out of the conversation with  
4 Sergeant Randall; correct?

5 A. No, sir.

6 Q. And then you -- did you write anything further in the  
7 grievance as a result of that?

8 A. Yes, sir. Going to the second level.

9 Q. Okay. And, so, then did -- to your knowledge did the case  
10 go to the second level?

11 A. It did go to the second level.

12 Q. And what response did you receive in the second level?

13 A. Partially granted. Same answer I got on the first level.

14 Q. And what partial granting was there? Do you see a letter  
15 there?

16 A. On the partially granted I received it received that the  
17 inmate can't know the outcome of what goes on with the CO.  
18 They can't tell you what kind of reprimand they give to the CO.

19 Q. After the second level, were you -- did you have to go to  
20 a higher level --

21 A. Yes, sir.

22 Q. -- with the case?

23 A. Yes, sir.

24 Q. Okay. And what level is that?

25 A. After the second level, you go to the direct appeal, which

1 is the third level in Sacramento.

2 Q. And did you do that?

3 A. Yes, sir.

4 Q. And you sent them the same grievance?

5 A. Exact same thing.

6 Q. And what response did you get to that appeal?

7 A. From the Sacramento appeal I got a deny. They didn't  
8 partially grant it. They didn't -- they just denied it.

9 Q. Uh-huh. And did they explain it at that time?

10 A. They gave an explanation but I don't have my paperwork  
11 with me, so I can't, you know, state what they informed me of,  
12 advised me of.

13 Q. Let me see if I can't provide it for you.

14 (Pause in proceedings.)

15 MR. CUNNINGHAM: I don't have it in this file.

16 Q. Did you receive a letter from -- I'm sorry -- the Chief  
17 Deputy Warden, Mr. Cohen?

18 A. Which one is it?

19 Q. Chief Deputy Warden, Mr. Cohen, that's the -- that will be  
20 the last couple pages in the Exhibit 6A1.

21 A. (Witness examines document.) "Response to the  
22 Correspondence Addressed to Internal Affairs," no, I don't see  
23 what you're talking about.

24 Q. Let me see.

25 (Pause in proceedings.)

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1           **THE WITNESS:** Okay. That's what I just said,  
2 Internal Affairs.

3 **BY MR. CUNNINGHAM:**

4 **Q.** So --

5           **THE COURT:** What are we referring to, Counsel?

6           **MR. CUNNINGHAM:** This is Exhibit 6A1, Judge, the last  
7 two pages, a letter --

8           **THE COURT:** There seem to be Bates stamp numbers on  
9 the bottom of these documents. If you could refer the Court to  
10 which Bates stamp number you're referring to.

11           **MR. CUNNINGHAM:** 434 and 430 -- AGO434 and 435.

12           **THE COURT:** They're not in order.

13                           (Pause in proceedings.)

14           **THE COURT:** You say they're the last --

15           **MR. CUNNINGHAM:** It should be the last or three of the  
16 last two pages in 6A1.

17                           (Pause in proceedings.)

18           **THE COURT:** The last pages I show are Bates  
19 stamped 392, 393, 395, and 396.

20           **MR. CUNNINGHAM:** Are you in 6A1, Judge?

21           **THE COURT:** There only seems to be....

22                           (Pause in proceedings.)

23           **THE COURT:** I see the last pages seem to be 376, 375.  
24 All right. This is -- hold on just a second.

25                           (Pause in proceedings.)



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1           **THE COURT:** All right. I have it now. Thank you.

2           **MR. CUNNINGHAM:** That was 6A2, I think, the other one.  
3 Thank you, Judge.

4           **THE COURT:** 434 and 435?

5           **MR. CUNNINGHAM:** Yes, sir.

6           **THE COURT:** Counsel, do you have copies of that?

7           **MR. QUINN:** I actually don't.

8                               (Pause in proceedings.)

9   **BY MR. CUNNINGHAM:**

10   **Q.** What was the title of that letter there?

11   **A.** "Response to Your Correspondence Addressed to  
12 Internal Affairs, Subject: Inmate Cleveland Memorandum."

13   **Q.** All right. And did the Warden -- did the Chief Deputy  
14 Warden then give you any indication that something would be  
15 done about this petition that you filed?

16   **A.** From reading this, no.

17   **Q.** Do you recall receiving that letter?

18   **A.** You know, I don't remember receiving this letter.

19   **Q.** Uh-huh. And does it explain why there is no response as  
20 you're reading it now?

21   **A.** Yes.

22   **Q.** And then was there anything more for you to do with this  
23 grievance after you received the director's denial and this  
24 letter here?

25   **A.** Once it goes through the director level, the third appeal,

1 as far as the institution is concerned, that's it. You've done  
2 everything. You've advised everybody of the situation that  
3 needs to be advised.

4 Q. All right. Did you then take another step, a different  
5 step?

6 A. Well, yes. After I did the third-level appeal and there  
7 was nothing done, I did a civil case.

8 Q. And did that turn into this case?

9 A. That turned into this case right here.

10 Q. Did you have at a later time another occasion to --  
11 another encounter with Officer Abanico?

12 A. After 2006?

13 Q. Yeah.

14 A. Yes, sir.

15 Q. And when was that?

16 A. 2007.

17 Q. Okay. And where did that occur?

18 A. In the corridor.

19 Q. Same corridor?

20 A. Yes, sir.

21 Q. Were you still living in the same housing unit?

22 A. Yes, sir. I was in F Wing.

23 Q. And was he working in F Wing then?

24 A. I don't recall Abanico ever working F Wing while I was  
25 housed in F Wing.

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1 Q. All right. When you were living in F Wing and coming and  
2 going from F Wing, did F Wing officers sometimes give you  
3 clothed body search, a random clothed body search, when you  
4 were going out into the corridor?

5 A. Not me, no.

6 Q. No? Did other officers sometimes at other points in the  
7 corridor search you --

8 A. Yes, sir.

9 Q. -- now and then?

10 A. Yes, sir.

11 Q. Did any of them ever search you the way Abanico had  
12 searched you that first time?

13 A. No, sir.

14 Q. All right. And you've been down -- in 2006, how long had  
15 you been in prison?

16 A. Incarcerated in prison since 2000. I was arrested in 1998  
17 and I fought my case for two years in L.A. County Jail.

18 Q. Uh-huh.

19 A. This is my second term, so I did '92 to '96.

20 Q. Okay. Did you get -- in '92 to '96 did you get searched  
21 by random clothed body searches?

22 A. Yes, sir, all the time.

23 Q. And did you get searched in L.A. County Jail?

24 A. All the time, sir. As a matter of fact, the L.A. County  
25 Jail searches you maybe two to three times more than you would

1 be searched in prison.

2 Q. And you have been -- so you had been in CDCR for five or  
3 six years then; right?

4 A. Yes, sir.

5 Q. And had that all been at Soledad?

6 A. Yes -- no. Pleasant Valley is where I started. I got  
7 transferred from there to Folsom, from Folsom to Quentin, from  
8 Quentin to Soledad.

9 Q. So how long had you been at Soledad in October of '06?

10 A. I got there in 2005. I think March of 2005.

11 Q. Okay. And, now, when did this next encounter occur with  
12 him?

13 A. On 6/20th.

14 THE COURT: I'm sorry, Counsel. When you say "with  
15 him" --

16 MR. CUNNINGHAM: With Abanico. I'm sorry, Judge.

17 THE COURT: Thank you.

18 THE WITNESS: June 20th.

19 BY MR. CUNNINGHAM:

20 Q. Of '07?

21 A. Of '07. I'm sorry.

22 Q. And in between those two times, did you sometimes see him  
23 in the corridor?

24 A. Oh, yes, sir.

25 Q. Did he pull you over?

1     **A.**    Before June 20th?

2     **Q.**    Yeah.

3     **A.**    The only time he pulled me over before June 20th was 2006  
4    when he did the --

5     **Q.**    On the occasion we've been talking about?

6     **A.**    Exactly.

7     **Q.**    Okay.

8     **A.**    But not until June -- 6/20 was I searched again by him,  
9    2007.

10    **Q.**    Okay.  And now we're looking at what's been marked as  
11   Plaintiffs' Exhibit 6A2.  Do you have that in front of you?

12    **A.**    Yes, sir.

13    **Q.**    That's a grievance that you prepared; is that right?

14    **A.**    Yes, sir.

15    **Q.**    All right.  And it's the same form of grievance and the  
16   same process?

17    **A.**    Yes, sir.

18    **Q.**    And what did you -- what was it that had happened between  
19   you and Abanico that you put into this grievance?

20    **A.**    That I had got stopped by Abanico and I had a court order,  
21   of show cause from the Monterey County court.  Abanico read my  
22   legal mail, which was a violation because they're not supposed  
23   to read our legal mail.

24    **Q.**    I'm sorry.  He did what with it?

25    **A.**    He read my legal mail that was in my pocket, and it had

1 his name in it, Cleveland versus Abanico. I was searched again  
2 by him on that day.

3 Okay. And then on the next day, on the 21st, I was  
4 searched by him twice coming up from chow -- going to chow and  
5 coming back. And then on the 22nd again.

6 Q. In those searches did he also grab and squeeze your  
7 genitals?

8 A. Yes.

9 Q. And what did you do in response?

10 A. On this -- on these incidents where I was grabbed, I just  
11 shook my head and grit my teeth because in this incident, if  
12 you keep complaining about this incident, you're going to the  
13 hole. So I filed an initial grievance on the fondling. On  
14 this one I filed a harassment because now I feel I was being  
15 harassed. Really I put that I was being clowned, so....

16 Q. And reading this I don't see any mention of grabbing the  
17 genitals.

18 A. I just used the violations Eighth Amendment, and I stated  
19 that this officer in my opinion needed help, mental help.

20 Q. And you wrote a couple of extra pages describing your  
21 feelings about what had happened, what should be done?

22 A. Yes. I stated that I feel it was retaliation.

23 Q. All right. And we don't have any further documents  
24 besides the grievance. Do you recall how -- what the response  
25 from the institution was on this grievance in '07?

1     **A.**   Partially granted.

2     **Q.**   I mean, did you have an informal interview like you did  
3     with Sergeant Randall in the other one?

4     **A.**   You know, Sergeant Randall is on this one, but he just  
5     signed it off. I don't remember talking to him. He signed it  
6     off. Sergeant Randall is on this one in 2007.

7     **Q.**   I see. Okay. It has his name at the top of the second  
8     page there?

9     **A.**   Yes, sir.

10    **Q.**   But he didn't write anything in there; right?

11    **A.**   No. He just partially granted it.

12    **Q.**   Partially granted in that he talked to you?

13    **A.**   Yes, sir.

14    **Q.**   Okay. And then did you go beyond that stage --

15    **A.**   Yes, sir.

16    **Q.**   -- with the grievance?

17    **A.**   Yes, sir. I went to what is called Division F.

18    **Q.**   Did Randall -- when you spoke to him, did he make excuses  
19    for Abanico?

20    **A.**   He just --

21           **MR. QUINN:** Objection. Hearsay.

22           **THE COURT:** Sustained.

23    **BY MR. CUNNINGHAM:**

24    **Q.**   Did he give you some explanation of what, if anything,  
25    could be done or that nothing could be done? Or strike it.

1           When you were done with Sergeant Randall, did you have any  
2       sense that anything was going to be done about Abanico?

3       **A.**    No.  No, I did not.

4       **Q.**    Did you have any sense that Abanico had even been talked  
5       to by anybody, any supervisor or anything about the way he  
6       searched you?

7           **MR. QUINN:**  Objection.  Calls for speculation.

8           **THE COURT:**  Overruled to the extent that he can  
9       testify to his own personal knowledge.

10          **THE WITNESS:**  Can you repeat the question, please?

11       **BY MR. CUNNINGHAM:**

12       **Q.**    Did you have -- strike it.  Now, I lost the question.

13          **THE COURT:**  Did you have any sense that Abanico had  
14       ever been talked to by anybody, any supervisor or anything  
15       about the way he searched you?

16          **THE WITNESS:**  Yes.  I think a supervisor spoke to him  
17       about it.

18       **BY MR. CUNNINGHAM:**

19       **Q.**    And was there any change in the technique that he used on  
20       you the second time or that clutch of times, those couple of  
21       days in a row, from the first time?

22       **A.**    It wasn't as hard.  It wasn't as aggressive as the first.  
23       You know, the spots was the same, but it wasn't -- it wasn't  
24       the same fondling motion.  It wasn't the same as the first  
25       search, and I'm not going sit up here and make up something



1 onto Abanico.

2 Q. Okay. But it was a repetition of what happened the first  
3 time?

4 A. Oh, yes, sir, without a doubt.

5 Q. What did you do the first time when he grabbed your  
6 private parts?

7 THE COURT: When you say "the first time" --

8 MR. CUNNINGHAM: In the earlier event that we talked  
9 about --

10 THE WITNESS: 2006.

11 MR. CUNNINGHAM: -- for the first grievance that  
12 turned into a petition.

13 MR. QUINN: I just object on the grounds that it's  
14 been asked and answered.

15 THE COURT: Overruled.

16 THE WITNESS: I squared off on him, and I would like  
17 to explain what squared off means to the jury.

18 Turned around with my fist balled up face to face and  
19 said, "You're not supposed to be touching me like that."  
20 That's what "squared off" means, when an inmate says he  
21 "squared off."

22 BY MR. CUNNINGHAM:

23 Q. And to your knowledge is just that gesture, turn around  
24 and square off with your fists --

25 A. Uh-huh.

1 Q. -- is that a violation in and of itself?

2 A. Was I supposed to do that?

3 Q. Yeah.

4 A. No.

5 Q. What did you -- what were you feeling at that moment when  
6 you turned around? What was going through your mind?

7 A. Embarrassment, shame, embarrassment, my pride knowing that  
8 I couldn't really do nothing about it even though I wanted to.

9 Q. Were you angry?

10 A. Very.

11 Q. Did you have to control your anger?

12 A. It wasn't easy but, yes, I did.

13 Q. Did you -- were you in your own mind when you turned  
14 around or when you spoke to him risking trouble with the  
15 institution?

16 A. Yes, sir.

17 Q. What could have happened to you in your mind?

18 A. I could have been -- I could have received SHU suit  
19 program for that. I could have been --

20 Q. What's a SHU program?

21 A. I could have been put in --

22 MR. QUINN: Objection. It calls for speculation.

23 THE COURT: Overruled.

24 THE WITNESS: That's what happens. If you take a  
25 defensive posture to a CO, you can be put in Ad.Seg. and then

## CLEVELAND - DIRECT / CUNNINGHAM

1 sent to the SHU. That's the rules. That's what happens. It's  
2 not speculation. That's the rules and that's what happens.

3 **BY MR. CUNNINGHAM:**

4 **Q.** And the SHU is what, S-H-U?

5 **A.** They send you to another prison. It's a hole inside --  
6 it's an Ad.Seg. inside of an Ad.Seg., you know, where you're in  
7 a cage 23 and a half hours a day. Your toothpaste is squeezed  
8 into a cup. There's no nothing. You don't even have the  
9 privileges that you have in Ad.Seg. so they belittle you from  
10 even that.

11 **THE COURT:** Well, let me just -- Mr. Cleveland, when  
12 you referred --

13 **THE WITNESS:** Yes, sir.

14 **THE COURT:** -- to the term "SHU," were you referring  
15 to the Security Housing Unit?

16 **THE WITNESS:** Yes, sir.

17 **THE COURT:** Thank you.

18 **THE WITNESS:** Thank you.

19 **MR. CUNNINGHAM:** S-H-U, yes.

20 **Q.** So you knew you were risking that at the extreme; correct?

21 **A.** Yes, sir.

22 **Q.** And were you risking any lesser difficulty or sanction in  
23 the institution?

24 **A.** Explain. I don't understand what you're talking about.

25 **Q.** Did you -- the SHU -- being put in a SHU term, given a

1 term in the SHU would be the most severe --

2 A. Punishment.

3 Q. -- punishment you could get; right?

4 A. Uh-huh.

5 Q. Was there a lesser -- any lesser levels of punishment you  
6 could have gotten?

7 A. You could have received a 115 or you could have received a  
8 warning, which is a 128.

9 Q. Uh-huh. Okay. Did you get anything --

10 A. No, sir.

11 Q. -- from him? No.

12 THE COURT: When you're saying "from him" --

13 MR. CUNNINGHAM: From Abanico, again, yes. I'm sorry,  
14 Judge.

15 Q. And on this second occasion or this little series of  
16 occasions two or three days running that resulted in the  
17 grievance that is Plaintiffs' Exhibit 6A2, that one has a  
18 number on it too; right?

19 A. You're talking about 6A2?

20 Q. Yeah.

21 A. It has a log number.

22 Q. What's that log number?

23 A. 07-02428.

24 Q. Okay. And were you -- did you have a similar kind of  
25 reaction -- strike it.

1           What was your reaction the second time, the first of these  
2           days when he pulled you over in June of '07?

3   **A.**    The reaction was to do the same thing, but it was  
4           different circumstances because of the fact that I knew it was  
5           a retaliation so I didn't do it. I wasn't going to buy into  
6           this. You know, I wasn't going to let him get me now in a  
7           situation where he could put me in the hole since he missed the  
8           first opportunity.

9   **Q.**    Did you say anything to him while he was doing it?

10 **A.**    No.

11 **Q.**    Was there a Sergeant Paradale or Pardack?

12 **A.**    I don't recall that sergeant.

13 **Q.**    Let me ask you this first. Let me show you on the  
14           exhibit.

15           **THE COURT:** Counsel, where are we going with this?

16           **MR. CUNNINGHAM:** I'm just trying to get this out, what  
17           happened with him.

18           **THE COURT:** All right.

19 **BY MR. CUNNINGHAM:**

20 **Q.**    Do you recognize that name that's marked there?

21 **A.**    No. I seen that and I don't recall that sergeant. It's  
22           been so long, it's been that long ago.

23 **Q.**    All right. In the course of the events that happened and  
24           the grievances that you filed, the one in '06 and one in '07,  
25           the one in '07 you didn't -- you decided yourself, right, only?

## CLEVELAND - CROSS / QUINN

1 You didn't go around and talk to others about it?

2 **A.** No, I did not, sir.

3 **Q.** Okay. And in that period of time, did anyone from  
4 administration ever come and sit you down and ask you what  
5 happened?

6 **A.** Not to my recollection, no.

7 **Q.** All right. Did you feel you had any opportunity besides  
8 just these writings to persuade anyone that you were telling  
9 the truth, anyone in the Administration, that this was true,  
10 that this was a problem?

11 **A.** I just wanted to -- at this time I wanted to create a  
12 paper trail because what I had done before this hadn't worked;  
13 and, like I said, I sent letters to all kind of agencies and  
14 everything I can think of. It didn't work. So now I'm just  
15 trying to keep a paper trail to protect me.

16 **MR. CUNNINGHAM:** All right. I have no further  
17 questions, Judge.

18 **THE COURT:** All right. It's 3:46 but why don't you  
19 start with your cross-examination.

20 **CROSS-EXAMINATION**

21 **BY MR. QUINN:**

22 **Q.** Good afternoon, Mr. Cleveland.

23 **A.** How you doing, sir?

24 **Q.** Good.

25 Did Abanico say anything of a sexual nature to you during

1 the searches?

2 A. No, sir.

3 Q. And he didn't touch you beneath the clothes; did he?

4 A. Explain yourself. Beneath the clothes?

5 Q. He didn't touch your genitals or any area beneath the  
6 clothing.

7 A. Skin to skin?

8 Q. Right.

9 A. No, sir.

10 Q. Did you seek any treatment for physical injuries following  
11 the searches?

12 A. Mentally or physically?

13 Q. Physical injuries.

14 A. No, sir.

15 Q. Now, Inmate Trask earlier testified to how officers will  
16 start at the top of the body, move down, move down to the leg,  
17 and basically cover the entire body. Is that your recollection  
18 of how Officer Abanico conducted the searches?

19 A. Can you repeat that?

20 Q. The question is basically that -- referencing the  
21 testimony by Inmate Trask earlier where he described how a  
22 search is done, and how officers typically start from the top  
23 and then move down to the bottom. Is that your recollection of  
24 how Officer Abanico conducted the searches?

25 A. No.

1 Q. How did Officer Abanico conduct the searches?

2 A. With me?

3 Q. Yes.

4 A. With the elbow in the back.

5 Q. Okay. What I'm asking you is: Did he begin from the top  
6 of your body?

7 A. No.

8 Q. Where did he begin?

9 A. He began by putting the elbow in the back. First he got  
10 the waist, pulled the pants back, looked at the buttocks, put  
11 the elbow in the back. And with him, he started on the inner  
12 thigh with me. Put the elbow in the back, right inner thigh,  
13 left inner thigh, squeeze the penis, squeeze the testicles.  
14 With me.

15 Q. And how long did those searches last?

16 A. Between three and four seconds. Well, on that one three  
17 to four seconds because I came off the wall.

18 Q. At this time I'd like to, if I may, reference your  
19 deposition testimony if you give me a moment.

20 A. Yes, sir.

21 (Pause in proceedings.)

22 BY MR. QUINN:

23 Q. Mr. Cleveland, do you recall giving -- or me taking your  
24 deposition on March 20th, 2013?

25 A. Yes, sir, unfortunately, I do.



## CLEVELAND - CROSS / QUINN

1 Q. And at that deposition Mr. Cunningham and the court  
2 reporter, you, and I were all present; is that correct?

3 A. Yes, sir.

4 Q. And before you answered those questions, you raised your  
5 right hand and was sworn by the court reporter to tell the  
6 truth; weren't you?

7 A. Yes, sir.

8 Q. And that's the same oath that you took today?

9 A. Yes, sir.

10 Q. And you did tell the truth during the deposition; is that  
11 correct?

12 A. To the best of my knowledge.

13 Q. And after you finished testifying, you had a chance to  
14 read your testimony to make sure it was accurate?

15 A. No. We didn't do that till a couple of days later. I  
16 think three or four days later or something.

17 Q. But you recall that all the questions and answers you gave  
18 were in a typed booklet titled "Deposition of Ivan Vernord  
19 Cleveland"; is that correct?

20 A. Yes.

21 MR. QUINN: At this time I'm going to open the sealed  
22 deposition of Mr. Cleveland.

23 THE COURT: He moves to unseal the deposition.

24 MR. CUNNINGHAM: No problem.

25 THE COURT: There's no objection.

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(Pause in proceedings.)

**MR. CUNNINGHAM:** Your Honor, again, for the record, I'm going to object to the projection of the text from the document rather than reading.

(Pause in proceedings.)

**THE COURT:** That objection will be overruled. You can proceed.

**BY MR. QUINN:**

**Q.** So just to recall, you mentioned that the first search lasted three to four seconds before you jumped off the wall; is that correct?

**A.** Yes, sir.

**Q.** I'd just like to read you page 24, line 13 -- page 24, line 11 --

**THE COURT:** Why don't we mark that, if we haven't marked it already, before we proceed?

**MR. QUINN:** We can mark it as Exhibit C.

**THE COURT:** Mark it as Exhibit C. All right. Exhibit C, page?

**MR. QUINN:** Page 24.

**THE COURT:** What lines?

**MR. QUINN:** Lines 11 through 14.

**THE COURT:** All right. Thank you.

(Defendants' Exhibit C marked for identification)

**MR. QUINN:** (reading)

1       **"Q.** How long did that search last?

2       **"A.** Between 60 and 70 seconds.

3       **"Q.** So about the same length as the first search?

4       **"A.** Yes, sir."

5       **Q.** So the contact with -- or the first search lasted 60 or 70  
6 seconds; is that correct?

7       **A.** After I came back from off the wall?

8       **Q.** Yes.

9       **A.** The whole searching process was 60 to 70 seconds, yes,  
10 sir.

11       **Q.** And it's your recollection or your testimony that during  
12 those 60 or 70 seconds, Officer Abanico only made contact with  
13 the groin area?

14       **A.** Inner thighs and groin area. That's what I stated in the  
15 deposition more than once.

16       **Q.** Again, yes, you stated he never searched the back, the  
17 thighs, the feet, never took off the shoes?

18       **A.** No. No, sir, he didn't do that. He never took off the  
19 shoes. Never searched the back.

20       **Q.** Never searched your thighs?

21       **A.** Inner thighs.

22       **Q.** Okay. I'd like to read to you from page 24 --

23               **THE COURT:** Just a minute.

24       **BY MR. QUINN:**

25       **Q.** -- lines 6 through 8 -- or lines 5 through 8: (reading)

## CLEVELAND - CROSS / QUINN

1       **"Q.** Never searched your chest?

2       **"A.** Never. Never searched my back, my thighs, never  
3 searched my feet. Never made me -- conducting taking off  
4 the shoes."

5           **MR. CUNNINGHAM:** Can he complete the answer, Judge?

6           **THE WITNESS:** I answered that. That's the way I  
7 answered it just now.

8       **BY MR. QUINN:**

9       **Q.** But you just responded that he -- today you're saying that  
10 he did --

11       **A.** The inner thighs.

12       **Q.** Well, in your deposition you stated he never searched your  
13 thighs.

14       **A.** Because me and you assumed it was the outside thighs.

15       **Q.** I didn't assume that.

16       **A.** I did.

17       **Q.** So it's your testimony that these searches were conducted  
18 in a long hallway with officers present and inmates passing  
19 through; is that correct?

20       **A.** Yes, sir.

21       **Q.** And with officers present in the hallway, other inmates  
22 moving through the hallway, Abanico touched nothing other than  
23 the groin area for 60 seconds?

24       **A.** For me or for other inmates?

25       **Q.** For you.

## CLEVELAND - CROSS / QUINN

1   **A.**   Yeah, the search lasted between 60 and 70 seconds. Not  
2   all the time. I've been searched by him five times. So I'm  
3   not going to say all the time they lasted 60 or 70 seconds, but  
4   the majority I would say 60 to 70 seconds in total.

5   **Q.**   I'll direct you to page 31, line 13 through 17,  
6   question --

7   **A.**   Which number, sir?

8   **Q.**   Page 31, lines 13 through 17.

9   **A.**   Okay.

10   **Q.**   (reading)

11       **"Q.** But, again, these searches lasted roughly a minute at  
12       the most?

13       **"A.** Roughly a minute.

14       **"Q.** 80 seconds?

15       **"A.** At the most."

16       Did I read that correctly?

17   **A.**   Yes. I don't feel that 80 seconds is that much from 60 or  
18   70 seconds.

19   **Q.**   But that's your testimony then; is that --

20   **A.**   Yes, sir.

21   **Q.**   That Officer Abanico in a long hallway with other officers  
22   present, other inmates present, maybe was in contact with your  
23   groin for 80 seconds?

24   **A.**   Yes, sir.

25   **Q.**   Do you have any witnesses to that?

## CLEVELAND - CROSS / QUINN

1     **A.**    Here on how he searched me?

2     **Q.**    Anywhere.

3     **A.**    I have witnesses, but they're not here.  I have 127  
4     witnesses.

5     **Q.**    None of them are here today?

6     **A.**    No.

7     **Q.**    And during your deposition, you claimed that every time  
8     that Abanico touched you, it was inappropriate; is that  
9     correct?

10    **A.**    I felt it was, yes.

11    **Q.**    And, yet, on your -- in the 602 --

12    **A.**    Which one, sir?

13    **Q.**    The one entitled 07-2428.

14           **MR. CUNNINGHAM:**  Which exhibit?  6A2?

15           **MR. QUINN:**  It's Plaintiffs' Exhibit 6A2.

16           **THE WITNESS:**  07-2428?

17    **BY MR. QUINN:**

18    **Q.**    Yes.

19    **A.**    Okay.  Yes, sir.

20    **Q.**    The 602 references four searches within a three-day  
21    period:  6/20/07, 6/21/07 -- two on 6/21/07, one on 6/22/07.

22    And yet despite the testimony that "every time Abanico touched  
23    me it was inappropriate," that 602, which was written on  
24    6/23/07, does not include any reference to Abanico fondling and  
25    touching you; does it?

## CLEVELAND - CROSS / QUINN

1   **A.**   No.  It has something to do with guard brutality and an  
2   Eighth Amendment violation.

3   **Q.**   Right.  But there's no mention of any molestation or  
4   fondling?

5   **A.**   I feel that it was brutality.  That's just my opinion.

6   **Q.**   But, again, just to clarify, three searches -- four  
7   searches within a three-day period --

8   **A.**   Yes, sir.

9   **Q.**   -- you prepare a complaint and you do not mention any  
10  molestation, fondling or abuse, physical abuse or sexual abuse,  
11  by Abanico in that 602?

12  **A.**   No, sir, I did not.

13           **MR. QUINN:**  Okay.  That is all.

14           **THE COURT:**  Anything further?

15           **MR. QUINN:**  That's it.

16           **MR. CUNNINGHAM:**  That's it?

17           **THE COURT:**  All right.  Do you have redirect, Counsel?

18           **MR. CUNNINGHAM:**  (Nods head.)

19           **THE COURT:**  It's 3:58.  How long do you anticipate  
20  your redirect?

21           **MR. CUNNINGHAM:**  Ten to fifteen minutes.

22           **THE COURT:**  What would the jury like to do?  Would you  
23  like to go for the redirect or shall we call it quits for today  
24  and start up first thing tomorrow morning at 9:00?

25           **A JUROR:**  Start tomorrow.

## PROCEEDINGS

1           **THE COURT:** All right. Then we'll take our afternoon  
2 recess at this time. I'll ask you all to be here a little bit  
3 early so that we can promptly start at 9:00 a.m.

4           Thank you so very much.

5           **THE WITNESS:** Thank you, Judge.

6           **THE COURT:** Have a good evening.

7           (Proceedings were heard out of the presence of the jury:)

8           **THE COURT:** At this time I think Mr. Cleveland can  
9 step down subject to being recalled tomorrow morning.

10           (Pause in proceedings.)

11           **THE COURT:** All right. A couple of things.  
12 Madam Reporter, can you bring me back 15:55:51.

13           (Pause in proceedings.)

14           **THE COURT:** All right. During cross-examination....

15           (Pause in proceedings.)

16           **THE COURT:** All right. During cross-examination:  
17 (reading)

18           **"Q.** Do you have any witnesses to that?

19           **"A.** Here on how he searched me?

20           **"Q.** Anywhere.

21           **"A.** I have witnesses, but they're not here. I have 127  
22 witnesses.

23           **"Q.** None of them are here today?

24           **"A.** No.

25           **"Q.** And during your deposition, you claimed that every



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1 time that Abanico touched you, it was inappropriate; is  
2 that correct?

3 "A. I felt it was."

4 To the extent that counsel's elicited testimony regarding  
5 the 127 witnesses that he has indicated were witnesses to this,  
6 you may ask Mr. Cleveland tomorrow morning as to who saw him,  
7 who else saw this happen and under what circumstances.

8 MR. CUNNINGHAM: Who else saw the particular search as  
9 opposed --

10 THE COURT: That's correct?

11 MR. CUNNINGHAM: -- to the 127?

12 THE COURT: Yes.

13 MR. CUNNINGHAM: Okay.

14 THE COURT: Now, then, to the extent that we have some  
15 exhibits, let's go through those.

16 Madam Clerk, I'll let you call the exhibits, the numbers,  
17 and we'll go from there. That's probably the easiest.

18 THE CLERK: Okay. For defendants, Exhibit B, which is  
19 the Trask deposition, and Exhibit C, which is the Cleveland  
20 deposition, have now been marked for identification.

21 THE COURT: All right. Do you wish the pieces that  
22 you cross-examined to be moved into evidence?

23 MR. QUINN: Yes, Your Honor.

24 THE COURT: All right. Then what I'm going to do is  
25 I'm going to ask you -- where do we have a Xerox machine? Do

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1 we have one here?

2 **THE LAW CLERK:** Hallway.

3 **THE COURT:** Okay. Take the exhibits, go into the  
4 hallway, mark the portions that you used for cross-examination,  
5 and then have them marked and move those into evidence.

6 Ms. Clark, is that all right with you?

7 **THE CLERK:** That's fine.

8 **THE COURT:** All right. I have to check, you know.

9 (Defendants' Exhibits B and C received in evidence)

10 **THE COURT:** Any other defense exhibits that we need to  
11 discuss?

12 **MR. QUINN:** With regard to the copying, I thought we  
13 were just going to move the entire depo into evidence.

14 **THE COURT:** Well, it's not relevant.

15 **MR. LEWIS:** Portions --

16 **THE COURT:** The portions that you used for impeachment  
17 I'll allow you to move into evidence; but the whole deposition,  
18 no. You have the witness here. It becomes hearsay.

19 Any other defense?

20 **THE CLERK:** No. That's all for the defense,  
21 Your Honor.

22 **THE COURT:** All right. Why don't we move through the  
23 plaintiffs'.

24 **THE CLERK:** Okay. The plaintiffs have Exhibit 1, 2 --

25 **THE COURT:** Let's start --

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1           **THE CLERK:** Okay. Exhibit 1.

2           **THE COURT:** I'm a slow guy.

3           All right. Exhibit 1. Given my prior motion in limine  
4 ruling as to everything except 405 and 406, which is the first  
5 page -- I'm looking at the Bates numbers --

6           **MR. QUINN:** I don't have it in front of me.

7           **THE COURT:** All right. The staff complaint, the first  
8 page and the second page, I'm going to allow that to be moved  
9 into evidence; but the portion thereafter, the handwritten part  
10 which talks about the other inmates and the listing of the --  
11 I've forgotten how many numbers there are now -- but the other  
12 inmates, we discussed that is hearsay and as such I won't allow  
13 that in.

14          Now, if counsel wishes to include in the staff complaint  
15 the handwritten portion, pages 1, 2, and I guess 3 and 4 signed  
16 by Mr. Cleveland, if the references to the previously ruled  
17 hearsay parts is excised and the parties agree to it, I'll  
18 allow that to come into evidence.

19          But at this juncture all I'm going to allow right now is  
20 page 1 and 2 of Plaintiffs' 1 to be admitted into evidence at  
21 this time.

22          (Plaintiffs' Exhibit 1 received in evidence)

23           **THE COURT:** The next plaintiffs'?

24           **MR. CUNNINGHAM:** Judge, you're saying the references  
25 over where he says, "See next page," or whatever, that that's

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1 out, the ones you just called, 2, 3, 4?

2 **THE COURT:** Mr. Cunningham, these two pages  
3 (indicating).

4 **MR. CUNNINGHAM:** Okay. All right. I follow you.

5 **THE CLERK:** Okay. Exhibit 2.

6 **THE COURT:** Exhibit 2.

7 Exhibit 2, the first page, Mr. Cleveland's statement may  
8 come in. The others are hearsay pursuant to my motion in  
9 limine ruling at this time. So you may allow the first page,  
10 Mr. Cleveland's statement, to come in. All right?

11 **MR. CUNNINGHAM:** All right.

12 **THE LAW CLERK:** Just the first page?

13 **THE COURT:** Just the first page at this juncture.

14 **MR. CUNNINGHAM:** Without prejudice to some possibility  
15 that further parts --

16 **THE COURT:** Something may happen.

17 **MR. CUNNINGHAM:** -- will be tied up. Okay.

18 (Plaintiffs' Exhibit 2 received in evidence)

19 **THE COURT:** Next one, Madam Clerk?

20 **THE CLERK:** Exhibit 6A1.

21 **THE COURT:** All right. Now, then, 6A1 and 1 appear to  
22 be the same document.

23 **MR. CUNNINGHAM:** The first two pages are the same, the  
24 ones you admitted. 6A1 goes on to include the rest of whatever  
25 we had.

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1           **THE COURT:** That's also in Number 1, too.

2           **MR. CUNNINGHAM:** No. You just have up through the  
3 signatures in Number 1, and Number 2 and Number 6A1 there's  
4 responses, there's a number, there's the letters from the  
5 Internal Affairs. There's a bunch of different stuff in there,  
6 Judge.

7           **THE COURT:** All right. This was the Memoranda of  
8 Determination of Staff Complaint; the Office of  
9 Internal Affairs response; the memorandum 9/20/06 signed by the  
10 Deputy Chief Warden; the letter from Mr. Cleveland to Brad  
11 Williams, Special Agent; an envelope; another letter from  
12 Mr. Cleveland; a response from the Office of Internal Affairs  
13 dated October 10th, 2006; proof of service; Mr. Cleveland's  
14 Retaliation Request, Monterey Division, and its conclusion. It  
15 looks like there's a whole series of documents.

16           What's defendants' position?

17           **MR. QUINN:** Well, I don't have them in front of me.  
18 It was a little unclear when he was going through them what --

19           **THE COURT:** Did the parties exchange exhibits here?

20           **MR. CUNNINGHAM:** Yes.

21           **MR. QUINN:** We did; but as we were going through them,  
22 I didn't have some of them and they were handed to me, like 434  
23 and 436 or something were not in the materials that I had.  
24 So --

25           **THE COURT:** All right. What I'm going to do at this

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1 juncture is: My ruling is as to 6A1, pages 1 and 2, can come  
2 in at this juncture; however, since they are contained in  
3 Plaintiffs' 1, are you withdrawing 6A at this juncture?

4 **MR. CUNNINGHAM:** Well, if that's the only part -- if  
5 we're only getting those first two pages, yeah.

6 **THE COURT:** All right. And then if you wish other  
7 parts of it, you'll need to pull them out and re-mark them as  
8 other documents, and you can then ask the witness as to what  
9 they are and then you can move them individually into evidence.

10 **MR. CUNNINGHAM:** All right, Judge.

11 **THE COURT:** All right.

12 **MR. CUNNINGHAM:** Yes, sir.

13 **THE COURT:** The next plaintiffs' exhibit?

14 **THE CLERK:** 6A2.

15 **THE COURT:** That's a different complaint.

16 **MR. QUINN:** It's AG0373 as best I can glean.

17 **MR. CUNNINGHAM:** I'm sorry. What are we talking  
18 about, 6A2?

19 **THE COURT:** 6A2, Second-Level Staff Complaint. I show  
20 Bates numbers 373, 374, 375, and 376.

21 **MR. QUINN:** That's correct.

22 **THE COURT:** Objection?

23 **MR. QUINN:** (Shakes head.)

24 **THE COURT:** Moving that into evidence?

25 **MR. CUNNINGHAM:** Yes.

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1           **THE COURT:** 6A2 will be moved into evidence.

2           (Plaintiffs' Exhibit 6A2 received in evidence)

3           **THE CLERK:** And that's all, Your Honor.

4           **THE COURT:** At this time?

5           **THE CLERK:** Yes.

6           **THE COURT:** All right. Then you'll make photocopies  
7 of the transcript portions.

8           **MR. LEWIS:** Yes, Your Honor.

9           **MR. QUINN:** Yes.

10          **THE COURT:** All right. Anything else we need to take  
11 up at this time?

12          **MR. CUNNINGHAM:** I'm sorry, Judge?

13          **THE COURT:** Anything else we need to take up at this  
14 time?

15          **MR. CUNNINGHAM:** I don't have anything, Your Honor.

16          **THE COURT:** All right. Ms. Jaffe, I believe, gave  
17 both of you the proposed closing instructions; and I ask you to  
18 review them so that after submission of the evidence, we can  
19 promptly move to take a look at those, finalize the  
20 instructions, and get them to the jury and allow me to read  
21 them to the jury.

22          All right, Counsel --

23          **MR. CUNNINGHAM:** Judge, can we have a continuing order  
24 for showers for them to come in?

25          **THE COURT:** I think we did that already; did we not?

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1           **MR. CUNNINGHAM:** Well, the order was as of today, but  
2 what I'm asking is if they could have a shower tonight, too,  
3 and --

4           **THE CORRECTIONAL OFFICER:** Your Honor, that's already  
5 been addressed. They will be showered every evening for the  
6 entire court proceedings.

7           **THE COURT:** Thank you so much.

8           **MR. CUNNINGHAM:** Thank you, Sergeant.

9           **THE COURT:** All right. I'll see counsel at  
10 8:30 tomorrow morning.

11           **MR. LEWIS:** 8:30, Your Honor, yes.

12           **THE COURT:** Thank you very much. Court's in recess.

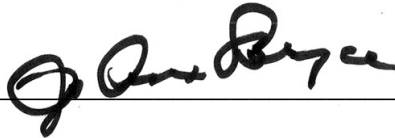
13                   (Proceedings adjourned at 4:13 p.m.)

14                   ---oOo---

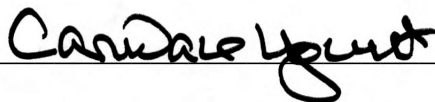
15                   **CERTIFICATE OF REPORTERS**

16           I certify that the foregoing is a correct transcript  
17 from the record of proceedings in the above-entitled matter.

18   DATE:   Monday, November 4, 2013

19  
20                   

21                   Jo Ann Bryce, CSR No. 3321, RMR, CRR  
22                   U.S. Court Reporter

23                   

24                   Candace Yount, CSR No. 2737, RMR, CCRR  
25                   U.S. Court Reporter